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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.
Petitioners,

VS.

UNITED STATES, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Clean Water Act reaches temporarily wet areas whose "waters" (a few inches of rainwater ponding only days or weeks during the winter season) are neither navigable nor adjacent to, or connected with, any navigable waterbody, and whose claimed link with interstate commerce is solely the presence of migratory birds or endangered species.

PARTIES BELOW

In addition to the parties named in the caption, defendants in the District Court and appellants in the Court of Appeals included the then Secretary of the Army (John O. Marsh), Chief of Engineers (Lt. Gen. E.R. Heiberg), and District Engineer for the San Francisco District of the Corps of Engineers (Lt. Col. Andrew M. Perkins), all sued in their official capacity. Intervenors in the District Court and appellants in the Court of Appeals were The Save San Francisco Bay Association, a non-profit California corporation, and National Audubon Society, a non-profit New York corporation.

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UNITED STATES, et al.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Leslie Salt Co. and Cargill, Inc., both Delaware Corporations, petition this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, together with the dissenting opinion of Judge Rymer, is reported at 896 F.2d 354, and is reprinted in the Appendix hereto, pp. A-1 to A-14.

The opinion of the District Court is reported at 700 F.Supp. 476, and is reprinted in the Appendix hereto, pp. A-15 to A-41.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1990. A timely petition for rehearing was denied on August 27, 1990 (App. A-42 to A-43, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act and of the implementing Regulations issued by the U.S. Army Corps of Engineers are reproduced in the Appendix hereto, pp. A-44 to A-45.

STATEMENT

1. The case arises under the Clean Water Act, enacted in 1972 and amended in 1977. 33 U.S.C. § 1251 *et seq.*[1] So far as relevant to this petition, that statute prohibits the discharge of any "pollutant" (including dredged or fill material) into "navigable waters," except in compliance with a permit issued under the Act. § 301(a), 33 U.S.C. § 1311(a); § 502(12), 33 U.S.C. § 1362(12). Responsibility for granting or denying such permits "for the discharge of dredged or fill material into the navigable waters" is assigned to the Secretary of the Army—effectively, the Corps of Engineers. § 404(a), 33 U.S.C. § 1344(a). And, finally, "navigable waters" is later defined as "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).

In turn, the Corps of Engineers has promulgated implementing regulations which, among other things, purport to delimit the agency's geographic jurisdiction by listing the several categories of aquatic and partially aquatic features that comprise the covered "waters of the United States." 33 C.F.R. Part 328. The only such provision that concerns us here is the inclusion of "other waters," 33 C.F.R. § 328.3(a)(3)—that is, all waters and wetlands that are not part of navigable interstate waterways or tidal waters (§ 328.3(a)(1) & (6)), do not themselves cross state lines (§ 328.3(a)(2)), and are not tributaries of such waters (§ 328.3(a)(5)), or adjacent wetlands (§ 328.3(a)(7)). In short, what is involved are so-called "isolated" waters wholly uncon-

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[1] The claim under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, has apparently fallen away. See p. 6, *infra*.

nected to any past, present or potential artery of interstate commerce and lying entirely within one state.

Under the regulation, "other waters" are covered only if their "use, degradation or destruction could affect interstate or foreign commerce." Three examples of such potential "effects" are given: use by interstate travellers for recreational or other purposes; production of fish or shellfish destined for interstate markets; or use by industries in interstate commerce. 33 C.F.R. § 328(a)(3). There is, however, no suggestion that the litigation site has any such link to "commerce," the only predicate for jurisdiction over the acreage still in dispute being its character as habitat for migratory birds or endangered species. As explained in a moment, this basis for coverage has never been incorporated in any regulation. It appears simply in the published preface to the 1986 regulations. See 51 Fed.Reg. 41217 (1986).

2. The litigation site is a 153-acre tract of undeveloped land southeast of San Francisco, once pasture land, whose condition has been somewhat altered, first by the owners to accommodate salt-making, and, more recently, by the acts of state and federal agencies, building roads, a large sewer, and culverts, breaching a levee on the adjacent wildlife refuge, and destroying a tidegate. App. A-2 to A-3, *infra*. One of the new roads has severed the property into two parcels, one of 143 acres, the other holding 10 acres. *Id.* at A-2. We are not here concerned with the southern "corners" or "tips" of the two parcels—comprising less than 9 acres together[2]—which have been determined to be "adjacent wetlands." See *id.* at A-4, A-6 to A-8. In this Court, we challenge only the ruling below as it affects some 100 acres in Parcel 143,[3]

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[2] The acres in question are depicted on Exhibit 159, pp. 54 (areas 3 and 4) and 57 (area P), explained at pp. 52-58. The wetland "corners" comprise approximately 6.6 acres of Parcel 10 and some 2.1 acres of Parcel 143. Exh. 159, pp. 55, 58.

[3] The Corps' claim of jurisdiction extended to 110 acres. E.R. 8. Subtracting the 9 acres of "corners," not challenged in this Court, some 101 acres remain. There is no assertion of jurisdiction over the balance of Parcel 10, so that the 100 acres still in dispute are all within the larger Parcel 143. See E.R. 14.

consisting of former crystallizers and calcium chloride pits once used in the salt manufacture process. See *id.* at A-5, A-8.

It is long since admitted that no part of this 100-acre tract qualifies as "wetlands," adjacent or otherwise, and it is common ground that the only water reaching this tract is rainwater, which creates temporary "ponds" entirely unconnected to any other waterbody—much less any navigable waterway. See *id.* at A-6 n.6, A-8 to A-9, A-11 to A-12. The question presented is whether these seasonally or "ephemerally" ponded acres[4]—"isolated" though they be—are nevertheless subject to regulation by the U.S. Army Corps of Engineers under the Clean Water Act as "waters of the United States." This is the issue reserved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 131 n.8 (1985). Here—as typically will be the case with respect to isolated waters or wetlands—the sole basis for embracing the site was the theory that its "degradation or destruction . . . could affect interstate or foreign commerce" because of the presence of migratory birds or endangered species. See App. A-11 to A-12, *infra*.

3. After a lengthy trial on cross-suits filed by the parties, the District Court held the Corps of Engineers without jurisdiction over any part of the property, whether under Section 404 of the Clean Water Act, or Section 10 of the Rivers and Harbors Act. App. A-41, *infra*. In dealing with the approximately 100 acre crystallizer and pit area still in dispute, the Court considered at

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We note that the claim of jurisdiction premised on alleged "tidal" effect, limited to 5 acres in the same "corners" determined to constitute adjacent wetlands (see E.R. 9), is mooted by our acquiescence in the wetlands ruling. See App. A-4 to A-5 n.5, *infra*.

[4] Although the court below speaks only of "seasonal" ponding, App. A-11, *infra*, the Corps asserted jurisdiction over a much more expansive area of the crystallizers which the Government itself described as subject only to "ephemeral" ponding. According to the Government's expert witness, some 14 acres, at most, were seasonally ponded (Tr. 1060-1062), and the remaining crystallizer acreage—some 85 acres—were said to suffer no more than "ephemeral ponding," a standard satisfied by a few inches of water in the bottom of plowed furrows standing for a "matter of hours" after a rainfall. Tr. 1091-1092.

length, and rejected on a variety of grounds, the Government's then primary wetland claim. *Id.* at A-33 to A-40. The Court also concluded that these acres could not qualify as "other waters"—as distinguished from wetlands—because the crystallizers and calcium chloride pits were artificially created and thus did not satisfy the standard set by the Corps' own regulations. *Id.* at A-32 to A-33. And, as the Court of Appeals acknowledged, *id.* at A-9, A-11, the District Court independently rejected the "other waters" claim for at least most of the site on the ground that "land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain." *Id.* at A-29. See also *id.* at A-35.[5] Given these holdings, the Court found it unnecessary to address the question presented here. *Id.* at A-30 to A-32.

4. The United States appealed, but abandoned its wetland claim except as to the nine acres of "corners." See App. A-6 n.6, *infra*. Over a partial dissent (*id.* at A-13), a majority of the Court of Appeals panel reversed in all respects. As previously noted, we do not now present any issue with respect to the parcel "corners" and accordingly need not describe the rulings confined to those 9 acres. See *id.* at A-6 to A-8. As to the balance of the property, the appellate court faulted the District Court for reading the Corps' regulations as not reaching the crystallizers and calcium chloride pits on account of their "artificial" origin, *id.* at A-9 to A-11, and likewise reversed the trial court's conclusion that the temporary ponding was insufficient to qualify these acres as covered "waters." *Id.* at A-11.[6]

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[5] Elsewhere in its opinion, the District Court described the crystallizers as "remain[ing] dry, except when rainwater accumulates during the winter" (App. A-22, *infra*), ponding only "temporarily" (*ibid.*), "in fact dry most of the year" (*id.* at A-32), "'inundated' only during and for a short time immediately after winter rains" (*id.* at A-34), and as an area where "rain water collect[s] . . . for a few days" (*id.* at A-35).

[6] It is worth noting that the Court of Appeals' reference to "standing water . . . remaining long enough for fish to live in the ponds" (App. A-2 to A-3) is misleading. See Dissent at App. A-13, *infra*. Small stickleback were spotted in a ditch that surrounds the northern calcium chloride pit and dried remains of such fish were found nearby. Tr. 677-

The Court of Appeals dealt with the issue now tendered to this Court in a few words. Without discussion—or acknowledging the reservation of the question in *Riverside*—the Court declared that the Clean Water Act embraces "any aquatic features within the reach of the commerce clause power" (App. A-6, *infra*), and that, accordingly, "the Corps' jurisdiction [extends] to local waters which may provide habitat to migratory birds and endangered species" (*id.* at A-12). The Court then remanded the case for "a factual determination of the sufficiency of the property's connections to interstate commerce." *Ibid.* But, in light of the Court's legal ruling and the state of the record, that is a mere formality. We do not deny that some part of the site satisfies the Court's standard;[7] our submission is simply that the Clean Water Act does not authorize the Corps to regulate on any such theory.

Although the Government had appealed the rejection of the Rivers and Harbors Act claim, the Court of Appeals does not discuss the point—beyond noting that such a claim was originally advanced by the Corps. App. A-4, *infra*. Presumably, in this one respect, the appeal failed.

Circuit Judge Rymer dissented as to the larger area of the crystallizers and calcium chloride pits. App. A-13, *infra*. She stressed that seasonal ponding there "creates no hydrological connection with any other body of water," and that "there is nothing in the record to show that water flows directly or indirectly from the crystallizers or pits into another body of water." *Ibid.* On that basis, Judge Rymer concluded that these areas were not embraced by the Corps' regulations and found it unnecessary to reach the issue reserved by this Court in *Riverside* and

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678, 1181-1183. But, given the prevalence of this hearty species in freshwater, these very limited sightings do not remotely imply a connection of the site with San Francisco Bay or suggest a generally ponded status for most of the crystallizer area.

[7] To be sure, if this Court were to decline review, we would be free on remand to litigate *how much* of the property is "other waters" frequented by migratory birds or endangered species.

presented here. *Ibid.*[8] Nevertheless, the Judge articulated substantial doubts concerning the propriety of extending jurisdiction on the basis of migratory bird use. *Id.* at A-13 to A-14 n.1.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Is Of Recurring Importance

In this Court, we are concerned with the jurisdiction asserted by the Corps of Engineers under the Clean Water Act over temporarily wet areas whose "waters"—a few inches of ponded rainwater which accumulates only during the winter rainy season —concededly are not adjacent to or connected with any navigable waterbody. Although broader questions involving all "isolated" waters, or all non-navigable "isolated" waters, are implicated, we focus on the present situation in which the waters are not only isolated, but also undeniably non-navigable, and the sole premise for coverage is the actual or possible use of the site as habitat by migratory birds or endangered species. And, finally, while noting the conflict of decisions with respect to the procedural flaw in the promulgation of the relevant "regulation," we press the substantive issue whether, in the Clean Water Act, Congress intended to regulate (or to authorize federal agencies to regulate) land of the character involved here on any such unconventional theory. This is the question pointedly left unresolved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n. 2, 131 n. 8 (1985).[9]

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[8] On its face, Judge Rymer's opinion would seem to require reaching the issue left open in *Riverside*, since the point of the "other waters" regulation is to embrace isolated waters having no connection to navigable interstate waterways. Perhaps the dissent should be read as sharing the District Court's view that the *degree* and *duration* of wetness of the site is inadequate to qualify it as "other waters," in the first place.

[9] The Court was there referring to one species of "other waters," so called "isolated *wetlands*", whereas here the Government has now abandoned the claim that the areas in question are wetlands, asserting instead that they are isolated "other waters" of unspecified character. The same regulation is implicated and the issue with respect to isolated wetlands typically presents the same ingredients as our case, a non-

1. The ruling we complain of has very far-reaching consequences. Narrowly defined as it seems, the question presented affects by far the largest part of the Corps' claimed jurisdiction under the "isolated" waters regulation. Indeed, there are relatively few navigable intrastate waterbodies that are entirely unconnected with an interstate waterway, and presumably there are not many wholly intrastate waters which, although non-navigable, are used by interstate travellers or interstate industries or produce fish or shellfish destined for interstate markets. See 33 C.F.R. § 328.3(a)(3). Our setting, on the other hand, is all too common.

Statistics are hardly necessary to demonstrate the prevalence of sometimes wet sites that attract migratory birds, albeit they are wholly unconnected with any navigable waterway and are not themselves remotely navigable. The relevant birds, we should stress, are not necessarily *water birds*; as was the case here for much of the property, they may be common upland birds, such as blackbirds, who come to drink or simply to rest. It is safe to say that embracing such areas within the Clean Water Act subjects several tens of millions of additional acres to regulation by the Corps of Engineers and at least potentially withdraws that quantity of land from development.[10]

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navigable site whose only claimed link with interstate commerce is the sometime presence of migratory birds.

[10] For present purposes, we assume that some part of the property in question qualifies as an "aquatic" site within the Corps' "other waters" regulation, even though it is no longer claimed that the crystallizers and calcium chloride pits are wetlands. But the typical case presenting the question we tender here presumably will involve isolated wetlands. It has been estimated that there are some 90 millon acres of "palustrine" freshwater wetlands within the continental United States, not including Alaska. See, Frayer, et al., *Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's*, 3, 20-21, 22-23 (Apr. 1983); U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* vii, 5, 9, 28, 29 (Mar. 1984). Unlike "marine", "estuarine," "lacustrine" and "riverine" wetlands, palustrine wetlands are not typically associated with any "deepwater habitat." Frayer, *supra*, at 12-13; USFWS, *Current Status*, etc., *supra*, at 9-11. Thus, a large part of the 90 million acres is isolated from any navigable waterway. To these wetland acres in the lower 48 must be

2. What is more, once the statute is held to authorize regulation of non-navigable isolated sites, it is very difficult to hold the agencies to any strict line distinguishing between land and water. This case illustrates the point, involving as it does an assertion of jurisdiction over areas no longer claimed to qualify as wetlands, albeit wetlands are supposedly the driest of the spectrum of "waters of the United States." For the most part, the land in dispute is only subject to what is described by the Government itself as "ephemeral ponding," a standard satisfied by the presence of standing rainwater a few inches deep in the bottom of the furrows of a plowed field for no more than a few hours at a time. Obviously enough, such over-zealous implementation of the "isolated" waters provision may escape judicial review, given the difficulty of faulting an agency's reading of its own regulations and the expenses and delays incurred in even successful litigation. Thus, an extension of jurisdiction like that seen here may well become the norm if the decision below remains undisturbed. In that event, the geographical scope of the Clean Water Act suddenly will have been expanded to embrace several times the acreage regulated for the first dozen years after its passage—all without any relevant amendment of the statute.

Of course, the Court ought not be asked to decide whether this result is or is not desirable. Our submission is simply that Executive Department agencies cannot be left free to accomplish such a radical transformation of private property into public land —with substantial potential exposure to the national treasury as a result of "takings" claims—unless Congress itself has chosen that course, or at least has authorized the administrators to embark upon it. We ask this Court's intervention to end the progressive expansion of a regulatory program that proceeds on the very unlikely premise that, without remotely saying so, Congress granted the implementing agencies uncabined discretion to ex-

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added substantial areas of isolated wetlands in Alaska (presumably an important share of Alaska's estimated total of 200 million acres, USFWS, *Current Status*, etc., *supra*, at 28), and some in Hawaii, as well as isolated non-navigable "rivers, streams, . . . mudflats, sandflats, . . . sloughs, prairie potholes, [and] wet meadows" elsewhere that do not constitute wetlands but attract migratory birds or endangered species.

tend their jurisdiction as far as evolving constitutional doctrine would authorize Congress itself to reach. But see n.20, *infra*.

3. In the present context, it should be stressed, the prospects of obtaining a permit under Section 404 are virtually nil. Indeed, the EPA Guidelines that presumably would be invoked foreclose discharges into covered waters if there is a "practicable alternative" (40 C.F.R. § 230.10(a)), and the existence of such an alternative is "presumed to be available, unless clearly demonstrated otherwise," where a "special aquatic site" (see 40 C.F.R. §§ 230.40-230.45) is involved and the development project is not "water dependent." 40 C.F.R. § 230.10(a)(3). In practice, these rules, together with other Guidelines (see, *e.g.*, 40 C.F.R. § 230.10(c)), predictably will defeat any permit application with respect to lands like those in suit.

It may be said that petitioner and like-situated landowners have an adequate remedy under the Tucker Act (28 U.S.C. § 1491)—as the court below suggested. App. A-7 to A-8, *infra*. To be sure, the availability of just compensation for a "taking" obviates any claim that the Clean Water Act works an *unconstitutional* taking of property. *Riverside*, 474 U.S. at 126-129 and nn.4 & 6. But this is no answer to our submission that *Congress did not authorize* regulation of lands like those involved here. If our point is sound, the Corps simply has no jurisdiction to grant or withhold a permit and no taking can occur.

Needless to say, the practical consequences of invalidating the Corps' extension of regulation to a site are very different from the result if only "taking" damages are available. Even for the landowner who is immediately intending to develop his property for subsequent sale, substantial delay and expense is involved when he is relegated to the Claims Court for money compensation. But far worse is the present situation of all those owners who may wish themselves to use the erroneously regulated site, or who may wish to sell it unimproved. In the first hypothesis, the owner, wrongly barred from enjoying his land, ought not be compelled to accept money instead. And, in the other case, the owner may well be without remedy, since he is not seeking a permit and, on the other hand, will find it difficult to sell what is effectively a lawsuit.

B. The Decision Below Is Plainly Erroneous

Notwithstanding the casual assumption to the contrary indulged by the majority below, we deem it plain that the Clean Water Act reasonably cannot be read to reach non-navigable isolated waters whose only connection with interstate commerce is the presence of protected wildlife. This is not to say that Congress has been indifferent to the fate of migratory birds or endangered species. On the contrary, special protective legislation has been enacted, typically providing for the preservation of habitat by authorizing the *purchase* of relevant sites or appropriate easements. See *North Dakota v. United States*, 460 U.S. 300 (1983).[11] But that simply was not the focus of the Clean Water Act, whose mission, as the statutory title implies, was to attempt to restore the purity of the national waters, not to protect interstate wildfowl or endangered species.[12]

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[11] Statutes enacted to this end include: Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, ch. 128, 16 U.S.C. § 703 *et seq.*; Migratory Bird Conservation Act of Feb. 18, 1929, 45 Stat. 1222, ch. 257, 16 U.S.C. § 715 *et seq.*; Bear River Migratory Bird Refuge Act of Apr. 23, 1928, 45 Stat. 448, ch. 413, 16 U.S.C. § 690 *et seq.*; Cheyenne Bottoms Migratory Bird Refuge Act of June 12, 1930, 46 Stat. 579, ch. 469, 16 U.S.C. § 691 *et seq.*; Migratory Bird Hunting Stamp Act of Mar. 16, 1934, 48 Stat. 451, ch. 71, 16 U.S.C. § 718, *et seq.*; Migratory Waterfowl and Other Wildlife Refuge in California Act of May 18, 1948, 62 Stat. 238, ch. 303, 16 U.S.C. § 695 *et seq.*; Migratory Bird Hunting Stamp Act Amendments of Aug. 1, 1958, Pub.L. 85-585, 72 Stat. 486, 16 U.S.C. § 718 (b) & (c); Wetlands Act of Oct. 4, 1961, Pub. L. 87-383, 75 Stat. 813, 16 U.S.C. § 715k-3 *et seq.*; Endangered Species Act of Dec. 28, 1973, Pub.L. 93-205, 87 Stat. 884, 16 U.S.C. § 1531 *et seq.*; Wetlands Loan Extension Act of February 17, 1976, Pub.L. 94-215, 90 Stat. 189, 16 U.S.C. § 715k-3; and Emergency Wetlands Resources Act of Nov. 10, 1986, Pub.L. 99-645, 100 Stat. 3582, 16 U.S.C. § 3901 *et seq.*

[12] It is true that the impact on wildlife and endangered species must be taken into account by the Corps of Engineers and EPA in deciding whether to grant a permit and where a discharge shall be allowed. Sections 404(b), (c) & (e), 33 U.S.C. § 1344(b), (c) & (c). See also, *e.g.*, 33 C.F.R. §§ 320.4(a), (b)(2)(i), (b)(6)(j)(4), 330.5(b)(3); 40 C.F.R. §§ 230.30, 230.32. But it does not follow that such considera-

This limited objective is reflected in the *activities* regulated by the Clean Water Act. The discharge of "pollutants" (including dredged and fill materials) into covered waters is prohibited. But, as the Corps itself acknowledges, the statute does not attempt to preserve waters or wetlands against alteration or even total destruction by any other means, such as excavation, draining, clearing, flooding or diversion of water source. See U.S. Congress Office of Technology Assessment, *Wetlands, Their Use and Regulation* 10, 11, 69-70, 149, 167-170, 175-176 (1984). Arguably, the Corps' inability to prevent the loss of substantial wetland acreage through presently unregulated activities suggests new legislation, State or federal. See, *e.g.*, National Wetlands Policy Forum, *Protecting America's Wetlands: An Action Agenda* (1988); OTA Report, *supra*, at 15-16. But, as it stands today, the Clean Water Act does not purport to be a wildlife protection statute or a wetland preservation measure.

Stretching the law beyond its original purpose is all the more questionable when isolated sites are sought to be encompassed. In the case of wetlands and other marginal areas adjacent to navigable waters or their tributaries, it may be assumed that Congress authorized their regulation on the ground that pollution or destruction of these "edges" would adversely affect significant waterbodies. No such water quality concerns are implicated, however, when we move further inland to unconnected isolated waters, especially very shallow seasonal ponds. The filling or degradation of such sites may be a blow to wildlife, but it has no impact on the purity of the national water system. Indeed, the Corps' assertion of jurisdiction over isolated tracts of this kind in no way depends upon any such effect, and there is no claim here that development of the property in suit would affect water quality elsewhere, directly or indirectly.

At the threshold, then, grave doubts arise whether the "isolated waters" provision even arguably implements the Clean Water Act, or is a well-meaning, but illegitimate, attempt to preserve inland aquatic sites—more or less seasonally wet—in the service of some wholly separate objective. This first impression is not dissipated but, rather, reinforced when we examine the words of the law more closely and consult its legislative history.

1. The statutory text itself rejects the notion that isolated non-navigable waters are meant to be reached. Section 404 expressly regulates the discharge of dredged or fill material into "*navigable waters*" alone. 33 U.S.C. § 1344(a). To be sure, that expression is later defined to mean "the waters of the United States" (§ 502(7), 33 U.S.C. § 1362(7)), and this Court has commented that this "makes it clear that the term 'navigable' as used in the Act is of limited import." *Riverside*, 474 U.S. at 133. But—as the Court impliedly recognizes—this is far from altogether discarding the notion of navigability as an anchor for the legislation.

In fact, the expression "waters of the United States," or a like term, had been used in legislation for most of a century to denote waters which, if not themselves navigable, were at least immediately connected to waterways useful for interstate or foreign commercial navigation.[13] And, less than a decade before our 1972 enactment, this Court had accepted as self-evident that the statutory expression "streams 'over which Congress has jurisdiction under its authority to regulate commerce' " reaches no further than "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 97 (1965).

The somewhat ambiguous definition of navigable waters no doubt authorizes those who administer the law to push back the *boundaries* of covered navigable waterways to include their non-navigable portions, their non-navigable tributaries, even their adjacent non-navigable wetlands. It does not allow them to ignore that the definition is of *navigable waters*, a term which simply cannot be stretched to embrace waters and wetlands that have *no connection* to any navigable waterway.

If Congress had meant to throw overboard the concept of navigation as the constitutional premise for the legislation, it knew the formula. As long ago as the Federal Power Act of 1920,

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[13] *See, e.g.*, Rivers and Harbors Act of 1894, § 5, 33 U.S.C. § 499; Act of Feb. 19, 1895, § 2, 33 U.S.C. § 151; Rivers and Harbors Act of 1899, § 10, 33 U.S.C. § 403; Act of Sept. 15, 1922, 33 U.S.C. § 472; Act of June 22, 1936, § 1, 33 U.S.C. § 701(a).

statutes had been written to reach activities "affecting" interstate or foreign commerce. See Federal Power Act, § 23(b), 16 U.S.C. § 817, construed in *Federal Power Commission v. Union Electric Co., supra,* 381 U.S. at 93-99. Here, instead of asserting jurisdiction over all waters whose degradation would affect interstate commerce, Congress chose to limit itself to regulating discharges "in" "navigable waters," however generously defined. This is not a difference we can overlook. Cf. *Polish National Alliance v. NLRB,* 322 U.S. 643, 647 (1944); *U.S. v. Lexington Mill & E. Co.,* 232 U.S. 399, 410 (1914).

There is, of course, no reason to be surprised that only "federal" waters and their adjuncts are apparently embraced. It was natural enough for federal legislation to concern itself with interstate navigable waterways, leaving local waters to State regulation. Moreover, it may have occurred to some Members that straying far beyond the sway of the federal navigational servitude would expose the Government to claims under the Just Compensation Clause.[14] Presumably, Congress was aware that, constitutionally, it could reach further—albeit at potential cost—but here,

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[14] Perhaps Congress was ready to exercise federal power to the boundary within which no substantial "taking" costs would be incurred, but no further. It must be remembered that the Clean Water Act was passed in 1972, before this Court declared that the navigational servitude creates no blanket exception to the Takings Clause. *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). The general understanding then was that an exercise of the servitude up to the high water line of navigable waterbodies involved no taking of private property. *United States v. Rands,* 389 U.S. 121, 122-123 (1967); *United States v. Kansas City Life Ins. Co.,* 339 U.S. 799, 808 (1950); *Kaiser Aetna, supra,* 444 U.S. at 184-190 (Blackmun, J., dissenting). And, indeed, with only very rare exceptions, this seems to be law again. See *United States v. Cherokee Nation of Okla.,* 480 U.S. 700, 703-707 (1987).

It is worth stressing that the present suggestion is *not* the argument rejected by the Court in *Riverside, supra,* 474 U.S. at 126-129. There the Court of Appeals had given the Clean Water Act a narrow reading to avoid the supposed problem of *unconstitutional* "takings," which was answered, inter alia, by presuming that just compensation would be available under the Tucker Act if a taking occurred. 474 U.S. at 127-129. We here make the different point that *cost* and *comity,* rather than

as elsewhere, there was no obligation to go to the constitutional limit. Cf. *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 400 (1975).

The fact is that the Clean Water Act on its face deals only with the waters whose pollution is federal business because they are closely related to interstate commerce. As in earlier legislation,[15] adjacent waters, including non-navigable tributaries and abutting wetlands, are included. But there is no ground for reading "waters of the United States" to encompass non-navigable waters or wetlands wholly isolated from interstate waterbodies, whose deterioration would not affect the federal water system.

2. Far from contradicting the indications of the text, the legislative history of the Clean Water Act fully confirms that navigability was the touchstone of coverage. It is true enough that Congress intended to define the covered waters "broadly," going beyond the "classical" or "traditional" tests followed under earlier water pollution control legislation. *E.g.*, 118 Cong. Rec. 33757 (1972). But this only meant including the non-navigable "portions" and "tributaries" of actually or potentially navigable watercourses—as the repeated invocation of cases so holding indicates. *E.g.*, 118 Cong. Rec. 33756-33757 (statement of Rep. Dingell); 118 Cong. Rec. 33699 (statement of Senator Muskie).[16] From first to last, the preoccupation was with navigability and the

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constitutional constraints, may have guided Congress to reach less far than it might have.

[15] *E.g.*, Act of June 29, 1888, § 1, 33 U.S.C. § 441 ("tributary waters" of New York Harbor); Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 ("any tributary of any navigable water"); Pub. L. 85-500, § 104, 33 U.S.C. § 610 ("navigable waters, tributary streams, connecting channels, and other allied waters.") See also *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-710 (1899).

[16] The decisions of this Court referred to in the legislative history which were apparently intended to reflect the limits of the Clean Water Act are *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-123 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-410, 426-427 (1940); and *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-525 (1941).

ultimate refusal meaningfully to define the term exhibits no more than a fear that any words used might be read too narrowly.

It is quite unreal to suggest that, without saying so, those who struggled so long over the way to define navigability meant to cast aside the concept and reach any waters which could be linked with commerce in wholly different ways. The court below misreads the legislative history of the Clean Water Act in concluding that Congress intended to regulate as far as the Commerce Clause would permit. What was in fact said was something very different: that the phrase "*navigable waters*" was to be given "the broadest possible constitutional interpretation." S. Conf. Rep. 1236, 92nd Cong. 2d Sess. 144 (1972); 118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie); see also, *Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 755 (9th Cir. 1978).

No doubt Congress meant to embrace all waters that could be reached under its Commerce Clause *power to regulate water commerce,* i.e., navigable waters, actual and potential, together with their "adjuncts". But there is not the slightest hint that Congress meant to invoke *other* Commerce Clause powers—unrelated to water commerce—to regulate isolated non-navigable waters. Indeed, it is significant that, in *Riverside,* this Court (unlike the court below) eschewed the easy path to its result—that Congress meant to go to the constitutional limit—and, instead, parsed at some length the legislative history of both the 1972 statute and the 1977 amendments in arriving at the expressly limited conclusion that wetlands immediately adjacent to a fully navigable waterway were within the ambit of section 404. See 474 U.S. at 124, 130-132, 135, 136-138.

At the least, it is obvious that those who wrote the Clean Water Act never contemplated that it could be stretched to include isolated waters on the basis of the presence of migratory birds or endangered species. In all the many thousands of pages of legislative history leading to the enactment of the law in 1972, and its revision in 1977, no one, whether legislator, administrator, State official, environmentalist or other witness, ever suggested such a ground for coverage. (In fact, the idea was not born until Congressional hearings in 1985). Yet, it was hardly a secret that migratory birds used isolated waters and wetlands, perhaps most

notably the prairie potholes of the Plains States. See *North Dakota v. United States, supra,* and the legislation there discussed.

Nor is this a trivial matter that might have passed in silence. The new theory of federal jurisdiction is adventurous, to say the least.[17] It surely would not have been accepted by all Members, without debate, as constitutionally legitimate, or as according appropriate deference to State claims to regulate their own local waters. And, as we have seen, the practical consequences of predicating federal regulation on such a basis are far too large to have provoked no comment.

In sum, the legislative history of the Clean Water Act refutes the claim that isolated non-navigable waters—especially wet areas linked to other states only by migratory species—were ever within the ambit of the legislation. It remains only to show that the contrary result below cannot be justified by resort to the rule of deference to administrative construction.

3. We have sought to show that there is no room for reading into the Clean Water Act a license to regulate non-navigable isolated waters frequented by migratory birds or endangered

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[17] Accepting that the national dimension of the problem of identifying and protecting endangered species and migratory birds justifies federal legislation, it does not necessarily follow that the Commerce Clause authorizes the regulation of waters that are by definition localized and unconnected to any interstate system, merely because they harbor species whose preservation is deemed a national concern. Indeed, it is noteworthy that the originator of this suggested extension of jurisdiction did not claim that the presence of endangered species itself "affected" commerce, but rather that the species might provoke the "interstate movement of persons, such as scientists, who come . . . to study and observe them." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works,* 99th Cong., 1st Sess. 189-190 (1985) (Statement of Richard E. Sanderson, Acting Assistant Administrator, EPA) (hereinafter "*1985 Oversight Hearings*"). But there is no requirement of human movement in the "advice" as published or in the decision below. Nor is there any evidence in this case that out-of-state travellers of any kind were enticed to the litigation site.

species. Such a radical extension of coverage, we submit, is well beyond any reasonable construction of the statute, and, accordingly, cannot be vindicated simply by invoking the deference normally due the administrators' reading of the statute.[18] As it happens, moreover, our view is confirmed by the failure of the implementing agencies—including the usually avant-garde EPA —to "discover" the new basis of jurisdiction until more than thirteen years after the law was enacted. This circumstance makes it especially difficult to indulge any presumption in favor of the administrative construction,[19] and indeed, strongly suggests, not legitimate interpretation, but creative law-making by an agency with no such delegated authority.[20]

As has been said, we are not dealing with a relatively inconsequential detail: predicating Clean Water Act jurisdiction over isolated waters on the presence of migratory birds or endangered species brings tens of millions of acres under regulation for the first time, at least potentially banning all residential, agricultural, commercial or industrial use of the sites. Nor is this a matter that can have escaped the attention not only of the legislators, but also of the administrators for so long. The existence of such wet

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[18] *Dole v. United Steelworkers of America,* 108 L.Ed.2d 23, 38 (1990); *Sullivan v. Zebley,* 107 L.Ed.2d 967, 978 (1990); *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 207, 212-213 (1988); *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 516-517 (1988); see *Chevron USA v. NRDC,* 467 U.S. 837, 842-844 (1984).

[19] *Bowen v. Georgetown University Hospital,* 488 U.S. at 211-213. See also Bowen v. American Hospital Ass'n, 476 U.S. 610, 646 n.34 (1986); *Immigration & Naturalization Service v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987); *United States v. Leslie Salt Co.,* 350 U.S. 383, 396 (1956).

[20] In its appellate briefs in the *Tabb Lakes* case, discussed in a moment, the United States was at pains to assert—correctly, in our view —that the Clean Water Act grants no quasi-legislative power to the Corps of Engineers which would permit the agency, through "substantive" regulations, to expand the statutory coverage. See *Brief of the United States Appellant* 21-23, and *Reply Brief for the United States* 2, 8-10, in No. 89-2905, 4th Cir., *Tabb Lakes, Ltd., v. United States* (filed April 1989).

"islands"—especially prairie potholes and other isolated freshwater wetlands—and their importance to migratory birds, was well-known, and, as noted, had been the focus of special protective legislation. In this setting, then, it is impossible to pretend that the decision of 1985 to reach these areas under Section 404 of the Clean Water Act was merely the belated revelation of a previously unrecognized truth that had always been a brooding omnipresence in the sky.

Also instructive is how the decision came to be made. The Corps of Engineers itself had initially read the Clean Water Act as embracing no more than those navigable waters and their adjuncts that were subject to the federal navigational servitude.[21] Only under compulsion of a court decree in *NRDC v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975), did the Corps rewrite its regulations to reach any isolated waters. See 1975 Regulations, 40 Fed. Reg. 31320 *et seq.* The new regulations barely survived Congressional scrutiny. See *Riverside*, 474 U.S. at 135-137. But, at all events, there was as yet no suggestion that bird use or the presence of endangered species alone would trigger "isolated waters" jurisdiction. Even EPA had made no such claim.

The novel notion underlying the decision below was born during hearings in 1985 before a Senate Subcommittee, where EPA, followed by the Corps, under obvious pressure, agreed to make the jump. See *1985 Oversight Hearings* at 169-170, 189-190, 212. This is not the hallmark of a change of position that merits deference because it results from the "well-considered" judgment of an expert agency, carefully rethinking the import of the statute during "a detailed and comprehensive process," and altering its view "based on its 'expertise and in light of [its] experience in administering the contested provision.' " Compare *Robertson v. Methow Valley Citizens Council*, 104 L.Ed.2d 351,

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[21] See *Development of New Regulations by the Corps of Engineers, Implementing section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. 29 (1975) (hereinafter "*1975 House Hearings*"). See also *id.* at 5, 6, 34.

373-374 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

The problem is compounded by the "back-door" procedure followed by EPA and the Corps of Engineers in effectuating the new rule. The proposition that the presence of migratory birds or endangered species henceforth would suffice to bring non-navigable isolated waters or wetlands within the Clean Water Act was not announced as a proposed new regulation or an amendment to existing regulations, but was treated as merely a further illustration of the kind of interstate commerce link that was required under the old "isolated waters" regulation. The Corps first purported to apply the new standard by an unpublished "Memorandum" issued by the national headquarters to the several district offices in November 1985, and this was followed by a comment prefacing the issuance of new regulations in November 1986, advising that the "EPA has clarified" that the requisite link with interstate commerce may also be satisfied by showing that isolated waters "are or would be" used as habitat by migratory birds or endangered species. See 51 Fed. Reg. 41217 (1986). Significantly, however, no advance notice was given and neither EPA nor the Corps has incorporated the additional "examples" in the body of the regulations defining "other waters." See 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).

It is well settled that such an attempt to extend jurisdiction without affording affected property owners and the wider public an opportunity to comment beforehand violates the Administrative Procedure Act, 5 U.S.C. § 553, unless the "advice" properly can be described as a mere "interpretive rule" or a "general statement of policy." 5 U.S.C. § 553(b)(3)(A). That was the issue fought out in *Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726 (E.D. Va. 1988), in which the Corps asserted jurisdiction over some 38 acres of isolated waters and wetlands apparently on the sole basis that migratory birds made their habitat there. The court held for the landowner, concluding that the new rule was "substantive" and therefore invalid as having been promulgated

without the required notice and opportunity for comment.[22] Although that decision had been affirmed in all respects by the Fourth Circuit Court of Appeals, 885 F.2d 866 (1989) (Table), 20 ELR 20008, the court below chose to ignore the ruling, thereby creating a square conflict. What is more, the United States determined not to seek review of *Tabb Lakes* in this Court, with the consequence that, in the Fourth Circuit, the Corps does not assert Clean Water Act jurisdiction in a situation like that presented here.[23] See App. E, *infra* pp. A-46 to A-49.[24]

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[22] The court in *Tabb Lakes* was concerned only with an immediately effective internal "Memorandum" or "Guidance Letter" issued in November 1985, supplemented in February 1986, rather than the prefatory commentary to revised regulations published in the Federal Register on November 13, 1986. But this can make no difference, since no greater opportunity for comment before effectiveness was afforded in the latter instance. Indeed, the new extension of jurisdiction was effective in November 1985, and the public announcement of that occurrence a year later cannot cure the fatal procedural defect.

[23] The Government may acquiesce in an adverse decision in one judicial District or Circuit without suffering the penalty of estoppel if it later decides to challenge a like ruling elsewhere in favor of a different party. *United States v. Mendoza*, 464 U.S. 154 (1984). But, needless to say, this special privilege does not prejudice the right of a private litigant adversely affected by the inconsistent stance of the United States to petition for certiorari. Nor does the Government's willingness to administer a national statute differently in some States eliminate the desirability of a uniform interpretation.

[24] The Joint Memorandum of EPA and the Corps of Engineers reproduced in the Appendix hereto recites that the problem will be resolved "as soon as possible" by "an APA rulemaking process." ¶ 2, *infra* p. A-48. But, to date, no notice of such rulemaking has been issued, notwithstanding that the Fourth Circuit's decision in *Tabb Lakes* occurred more than a year ago. It is perhaps not unreasonable to surmise that the relevant agencies are reluctant to open a debate about the legitimacy of extending the Clean Water Act to reach non-navigable isolated waters whose only connection to interstate commerce is the transitory presence of migratory birds—and that this reluctance may persist indefinitely, absent this Court's intervention.

Equally important for our purposes, however, are the "grave doubts" voiced by the *Tabb Lakes* court as to the substantive validity of the attempted jurisdictional expansion, even if properly promulgated. 715 F.Supp. at 729, district court opinion adopted, 20 ELR at 20009. We note that a Judge of the Sixth Circuit has also questioned the propriety of extending coverage on this basis. See *United States v. Larkins*, 852 F.2d 189, 193-194 (1988), (Merritt J., concurring). And, of course, the dissenting Judge here has expressed the same reservations. App. A-14, *infra*.

C. The Issue Is Ripe For Resolution By The Court

The present case, we suggest, affords an appropriate vehicle to answer the important question left open in *Riverside*. The issue has divided the panel below and has provoked concerned comments elsewhere; it urgently calls for definitive resolution here.

To be sure, the decision below is, strictly speaking, interlocutory and, although jurisdiction unquestionably exists, the Court might be inclined to await a final judgment, as a discretionary matter. But, in this instance, the limited remand proceedings cannot eliminate or change the issue presented to this Court. It is common ground that *some* part of the litigation site seasonally ponds rainwater and is frequented by migratory birds. Accordingly, the question whether this is a proper basis for regulation under the Clean Water Act will remain no matter the exact delimitation of the affected area. On the other hand, if we are correct, this Court's disposition will entirely avoid the wasteful expenditure of time and money—including judicial time—otherwise consumed in remand proceedings. And, of course, a substantial delay in the final resolution of the question will impose a heavy burden on many landowners throughout the country.

We need hardly add that this is not a case like the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), in which the availability of a Tucker Act remedy in another forum rendered moot the question there tendered to this Court, or like *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), in which the failure to exhaust administrative avenues of relief made premature any considera-

tion of a taking claim. The issue we present is one of statutory authority, which must be decided *before* any "taking" question arises. Indeed, our case is like *Riverside*, where the Court's conclusion that just compensation was due if a taking had occurred avoided the constitutional claim, but not the statutory submission, which was considered and decided.

In the circumstances, we submit the enormous consequences of the present ruling justify the plea for this Court's intervention now. Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-154 (1964), and cases there cited. See also, 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4036 at 27-33, and cases cited in n.57 (2d ed. 1988.)

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed so far as it vacates the decision of the District Court declaring that the United States Army Corps of Engineers has no jurisdiction under the Clean Water Act or the Rivers and Harbors Act over any portion of the property in suit other than the southern tips of each parcel.

Respectfully submitted,

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NOVEMBER 1990

Appendix A

United States Court of Appeals
For The Ninth Circuit

Leslie Salt Co., a Delaware corporation,
Plaintiff-Appellee,
v.
United States of America, et al.,
Defendants,
and
Save San Francisco Bay Association,
a non-profit California corporation;
National Audubon Society,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.
CA No. 89-15244
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL

United States of America,
Plaintiff-Appellant,
v.
Leslie Salt Co., a Delaware corporation; and
Cargill, Inc., a Delaware corporation,
Defendants-Appellees.
CA No. 89-15337
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, presiding
Argued and Submitted November 16, 1989
San Francisco, California
Filed: February 6, 1990

OPINION

Before: Farris, Pregerson, and Rymer, Circuit Judges.

Farris, Circuit Judge:

This is an appeal from a district court decision denying the Army Corps of Engineers jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 et. seq., over a parcel of land near the San Francisco Bay. The Corps had sought to require the landowner to obtain a permit before draining and filling the land, which over many years had acquired some aquatic characteristics. The district court found that because these conditions were artificial and were in part caused by the government, the Corps lacked jurisdiction. We reverse and remand.

BACKGROUND

This dispute revolves around a 153 acre tract of undeveloped land south of San Francisco, called the Newark Coyote Property, owned by Leslie Salt. A road separates the property into two parcels, one of 143 acres ("parcel 143") and one of 10 acres ("parcel 10"). The property abuts the San Francisco National Wildlife Refuge and lies approximately one quarter mile from the Newark Slough, a tidal arm of the San Francisco Bay.

The present condition of the property, or rather its condition in late 1985 through 1986 when the Corps claimed jurisdiction, is the result of many artificial changes to the property over the last 100 years. Originally the property was pastureland. The first change occurred early in this century, when Leslie's predecessors in interest constructed facilities for the manufacture of salt. They excavated pits on the eastern one-third of parcel 143 for depositing calcium chloride, and created large, shallow, water-tight basins on the western two-thirds for crystallizing salt. Salt production on the property effectively stopped in 1959. The calcium chloride pits and the crystallizers remained however, and each year they temporarily filled with water during the winter rainy season.[1] The extent of ponding is limited, but standing water did form on the property and remain long enough for fish to live in the

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[1] The San Francisco Bay area has a Mediterranean climate, in which rain falls primarily in the winter and spring, followed by a long dry season.

ponds. Plant life, which had been nonexistent due to the high salinity and compaction of the soil, formed in the crystallizers after Leslie plowed the property in 1983 to combat a dust problem.

The property was also substantially affected by construction of a sewer line and public roads on and around the property. This construction created ditches, road beds, and most importantly, culverts which hydrologically connected the property to the Newark Slough. Caltrans, the state highway authority, also breached a levy on the wildlife refuge adjacent to the property and destroyed a tidegate which had prevented the tidal backflow from reaching Leslie's property.

The effect of all this human activity was to foster natural, ecological developments: tidewater reached the edges of Leslie's property and caused the creation of some wetland features on the southern fringes. Migratory birds used the crystallizers and calcium chloride pits as habitat during the winter and spring when they were flooded. In addition, an endangered species, the salt marsh harvest mouse, used the property as habitat.

The controversy over this property arose in late 1985 when Leslie started to dig a feeder ditch and siltation pond on parcel 143 in order to drain the land. The Corps soon became aware of this activity and responded by issuing a cease and desist order pursuant to its authority under Section 404 of the Clean Water Act.[2] In that Act Congress directed the Corps, through the Secretary of the Army, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Corps claimed that Leslie was discharging a pollutant (fill) into waters of the United States in violation of

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[2] Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a) (1982), provides in pertinent part:

> The Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

section 301 of the Act.[3] The Corps also claimed that Leslie's activities were obstructing the navigable waters of the United States in violation of section 10 of the Rivers and Harbors Appropriations Act.[4] The Corps issued a second cease and desist order in early 1987 to stop Leslie from placing fill on parcel 10. The Corps issued that order in response to Leslie's attempts to block a culvert that connected its property to the Newark Slough.

In sum, the Corps claimed jurisdiction over the majority of the property. Leslie challenged that claim of jurisdiction and filed suit; the Corps countersued. The district court found in favor of Leslie on all grounds, holding that the property was not subject to the Corps' jurisdiction. The United States appealed that decision. Save San Francisco Bay Association and the National Audubon Society intervened on behalf of the United States.

The Corps now asserts jurisdiction over the property based on two separate theories which apply to two distinct portions of Leslie's land. First, the Corps argues that most of parcel 10 and the southern tip of parcel 143 are adjacent wetlands that are part of the Corps' Clean Water Act Jurisdiction.[5] To resolve this

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[3] Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) (1982), provides in pertinent part:

> Except as in compliance with this section and section[ ] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

The Act defines fill as a pollutant at 33 U.S.C. § 1326(6).

[4] Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

[5] The Corps also claims that the southern portions of the property are affected by the ebb and flow of the tide, and thus are subject to the Corps' jurisdiction under the Clean Water Act and the Rivers and

dispute we must first determine whether Congress intended that Clean Water Act jurisdiction should extend to property which government actions helped make aquatic. Because we find that it did, we then look to the Corps' regulations interpreting the Act, to determine whether they allow Corps jurisdiction. The Corps' second theory relates to the former crystallizers and calcium chloride pits. The Corps claims that these features are "other waters," as defined by Corps' regulations, that are subject to its jurisdiction.

STANDARD OF REVIEW

The district court's findings of fact are subject to a clearly erroneous standard of review. Issues of law, as well as mixed questions of fact and law that involve consideration of legal concepts rather than essentially factual inquiries, are reviewable de novo. *United States v. McConney,* 728 F.2d 1195, 1200-02 (9th Cir.), *cert. denied,* 469 U.S. 824 (1984).

When considering the Corps' interpretation of the Clean Water Act we defer to the agency's analysis if it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 131 (1985); *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 844-45 (1984). The agency's interpretation of its own regulations is entitled to greater deference, amounting to a plain error standard. *Montana Power Co. v. EPA,* 608 F.2d 334, 345 (9th Cir. 1979); *Chemical Waste Management, Inc. v. EPA,* 873 F.2d 1477 (D.C. Cir. 1989).

Harbors Act. *See* 33 C.F.R. §§ 328.3(a)(1), 328.4(b)(1) and 329.12(a)(2). *See also United States v. DeFelice,* 641 F.2d 1169, 1175 n.15 (5th Cir. Unit A April 1981) (citing cases). Because we find in favor of the Corps on its wetlands claim, we do not reach this alternate argument.

THE SOUTHERN PORTIONS OF THE PROPERTY

The Corps claims that the southern portions of the property are wetlands within its jurisdiction.[6] The district court denied the Corps jurisdiction for three reasons: (1) the wetland conditions were caused by the government, (2) the conditions were not "normal," as required by 33 C.F.R. § 328.3(b), and (3) the property was not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7).

A. Governmentally Caused Inundation

We agree with the district court that Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power. *See Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 755 (9th Cir. 1978) (citing *California v. EPA,* 511 F.2d 963, 964 n.1 (9th Cir. 1975), *rev'd on other grounds,* 426 U.S. 200 (1976)). However, the district court made an exception to this broad Congressional mandate and held that changes to the property *caused* by the government do not create jurisdiction. The court reasoned that a contrary holding would allow the Corps "to expand its own jurisdiction by creating some wetland conditions where none existed before." While this is a valid concern, the facts of this case do not present such a problem.

The district court relied upon *United States v. City of Fort Pierre,* 747 F.2d 464 (8th Cir. 1984). In *Fort Pierre,* the Corps asserted section 404 jurisdiction over a dry slough that had begun to exhibit wetland characteristics as a direct result of the Corps' dredging activity on a nearby river. The Eighth Circuit held that the Corps did not have jurisdiction due to the "peculiar facts and unique circumstances" of that case, in which "the Corps, as an unintended by-product of ordinary river maintenance, inadvertently create[d] a wetland-type ecological system on private property where no such system previously existed." *Id.* at 466,

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[6] The Corps initially claimed that almost all of the property qualified as a wetland. The United States only appeals the district court's determination as to the southern portions of the property, which the district court found had the physical characteristics of wetlands.

481. The Eighth Circuit recently reaffirmed limiting *Fort Pierre* to these specific facts. *See United States v. Southern Inv. Co.*, 876 F.2d 606, 612 (8th Cir. 1989).

The factual situation in this case differs substantially from that in *Fort Pierre*. Here, the Corps was not directly and solely responsible for flooding Leslie's land: Caltrans constructed the culverts which allowed water to flow onto Leslie's property; Caltrans and the Fish and Wildlife Service breached the levee on the wildlife refuge adjacent to Leslie's property which allowed water to flow up the culverts; Caltrans and the Fish and Wildlife Service failed to place effective floodgates on the culverts; Leslie itself maintained floodgates which unknown third parties propped open. Contrary to the district court's conclusion, the Corps did not itself create the wetland conditions and thereby attempt to expand its own jurisdiction.[7]

The fact the third parties, including the government, are responsible for flooding Leslie's land is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local acquatic ecosystems regardless of their origin. *See, e.c., Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) (Corps construction of a dam creates waters under Corps jurisdiction); *United States v. Tull,* 769 F.2d 182, 184 (4th Cir. 1985) (federal construction of mosquito-control ditch creates waters under Rivers and Harbors Act jurisdiction), *rev'd on other grounds,* 481 U.S. 412, 414 n.1 (1987); *United States v. DeFelice,* 641 F.2d at 1175 (illegal and unauthorized acts of third parties can create Rivers and Harbors Act jurisdiction), *cert. denied,* 454 U.S. 940 (1981); *Track 12 Inc. v. District Engineer, U.S. Army Corps of Engineers,* 618 F. Supp. 448, 449 (D. Minn. 1985) (state and locality construction of highway and sewage system creates Corps jurisdiction). If the Corps' regulations under Clean Water Act jurisdiction harm a landowner, her appropriate response is to seek damages through inverse condemnation proceedings, not to re-

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[7] All parties agree that the district court's statement that "the Corps flooded the wildlife refuge and thereby brought tidewater further inland," directly contradicts the record and its own statement of facts.

strict the scope of Corps jurisdiction. *Riverside Bayview Homes*, 474 U.S. at 128.

B. Normal Circumstances

The district court's second rationale for denying Corps jurisdiction over the southern portions of the property was a Corps regulation that defines wetlands as an area that "under normal circumstances" supports wetland vegetation. 33 C.F.R. § 328.3(b). Although the district court found the requisite wetland conditions, it held that "circumstances in those areas are not 'normal,' because the ability to support [wetland] vegetation was caused primarily by the government's flooding of the wildlife refuge across [the road]." The district court's interpretation of the "normalcy" requirement is tainted by its holding excluding governmentally created artificial waters from Corps jurisdiction.

The phrase "under normal circumstances" is meant to exclude those areas which are not aquatic, but experience an "abnormal presence of aquatic vegetation." 42 Fed. Reg. 37128 (1977). According to the district court's findings, the southern fringes of the parcel are aquatic areas. The fact that these wetlands are man-made does not make them "abnormal." Whether the wetlands are artificially or naturally created is irrelevant to this determination.

C. Adjacency

We disagree with the district court's third alternative holding, that this wetland is not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7). In reaching this conclusion, the district court again relied on its decision to exclude from consideration any consequences of the backflow through the culverts created by Caltrans and the Fish and Wildlife Service. In the absence of this erroneous holding, the southern portions of the property are adjacent to waters of the United States—the water in the culvert, which is directly connected to the Newark Slough.

THE CRYSTALLIZERS AND PITS

The Corps determined that the former crystallizers and calcium chloride pits qualified as "other waters" that were under

Corps jurisdiction according to 33 C.F.R. § 328.3(a)(3). That section defines "waters of the United States" to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

The district court held that the crystallizers and pits were not described by this section for two reasons. First, because they are artificial structures and the regulation lists only natural formations. Second, the court concluded that the ponding was too temporary to qualify as other waters. The district court also addressed but did not decide the question of whether the property has a sufficient connection to interstate commerce.

A. Artificial vs. Natural Formations

The district court applied the doctrine of *ejusdem generis*[8] to construe the regulations to exclude artificially created waters. The court noted that all the waters listed as "other waters" in section 328.3(a)(3) were naturally created, and concluded that the artificially created crystallizers and calcium chloride pits could not be covered by that section. The *ejusdem generis* rule of statutory construction is used to illuminate the intent of the drafters; when the rule conflicts with other, clearer indications of intent, its results should be ignored. *See Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963); *Black's Law Dictionary*, 464 (5th ed. 1979). Reliance on the rule is inappropriate in this case.

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[8] The "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . . [The rule does not] apply when the context manifests a contrary intention.

Black's Law Dictionary, 464 (5th ed. 1979). *See also* 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973).

First, the district court's interpretation conflicts with other parts of the Corps' regulations which assert that the Corps generally has jurisdiction over man-made waters under both the Clean Water Act and the Rivers and Harbors Act. *See* 33 C.F.R. §§ 328.5, 329.8. The Corps also defines at least one of the features listed in section 328.3(a)(3) to include artificial waters. *See* 33 C.F.R. § 323.2(b) ("lake" includes "a standing body of open water created by artificially blocking or restricting the flow of a river, stream or tidal area"). In addition, the Corps' comments to the final regulations support the power of the Corps to assert jurisdiction over artificially created waters:

> [W]e generally do not consider the following waters to be "waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.
>
> * * *
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which *are used* exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> * * *
>
> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel *unless and until the construction or excavation operation is abandoned* and the resulting body of water meets the definitions of waters of the United States (see 33 C.F.R. 328.3(a)).

51 Fed. Reg. 41206, 41217 (1986) (emphasis added). These comments show that the Corps intends to exempt from its jurisdiction only those artificially created waters which are currently being used for commercial purposes, and that even those waters are subject to such jurisdiction on a "case-by-case" basis of review. The crystallizers and calcium chloride pits have not been used for commercial purposes for decades and so are not subject to even this limited exemption. Finally, courts have uniformly included artificially created waters in the Corps' juris-

diction under the Clean Water Act and the Rivers and Harbors Act. *See, e.g., Tull,* 769 F.2d 182 (mosquito-control ditch); *Stoeco Dev. Ltd. v. Dept. of the Army Corps of Eng'rs,* 701 F. Supp. 1075, 1078 (D.N.J. 1988) (artificially created wetland), *appeal dismissed,* 879 F.2d 860 (3rd Cir. 1989); *United States v. Akers,* 651 F. Supp. 320 (E.D.Cal. 1987) (same); *Track 12,* 618 F. Supp. 448 (same); *United States v. Ciampitti,* 583 F. Supp. 483 (D.N.J. 1984) (same), *affirmed,* 772 F.2d 893 (3rd Cir. 1985), *cert. denied,* 475 U.S. 1014 (1986). We reject the district court's interpretation of the regulations as creating a distinction between artificial and natural waters.

B. Temporary Water Formations

The district court also held that the crystallizers and calcium chloride pits were not other waters because they "are in fact dry most of the year." Due to the climate in the Bay Area, ponding only occurs during the winter rainy season. The seasonal nature of the ponding is no obstacle to Corps jurisdiction however, because the regulations specifically enumerate two seasonal water features as other waters: intermittent streams and playa lakes. *See Quivara Mining Co. v. EPA,* 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986); *United States v. Phelps Dodge Corp.,* 391 F. Supp. 1181, 1187 (D.Ariz. 1975).

The Corps' determination that the crystallizers and calcium chloride pits are similarly seasonal bodies of water within the meaning of the regulations is proper. We reverse the district court's contrary conclusion.

C. Interstate Commerce

The crystallizers and pits must still have sufficient connections to interstate commerce to come under the Corps' jurisdiction as "other waters." 33 C.F.R. § 328.3(a)(3). The Corps has adopted the following EPA criteria to determine when waters have sufficient ties to interstate commerce:

> [Waters]
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species. . . .

51 Fed. Reg. 41206, 41217. The district court failed to determine whether the crystallizers and pits meet these standards. The record showed however, that migratory birds (including many protected by Migratory Bird Treaties) and one endangered species may have used the property as habitat. The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species. *See Utah v. Marsh,* 740 F.2d 799, 804 (10th Cir. 1984); *Palila v. Hawaii Dep't of Land and Natural Resources,* 471 F. Supp. 985, 991-95 (D.Hi. 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981). *See generally Hughes v. Oklahoma,* 441 U.S. 322, 329-36 (1979). We remand this issue to the district court to determine if the property has the requisite connections to interstate commerce.

CONCLUSION

The southern portions of Leslie's property meet both the statutory and regulatory requirements for the Corps to exert Clean Water Act jurisdiction over them. The fact that the government in part caused the inundation of the property is not of consequence. Similarly, the government's actions do not affect the normalcy or adjacency requirements of the regulations. As to the crystallizers and calcium chloride pits, their artificiality and temporary wetness pose no obstacle to Corps jurisdiction. We remand to the district court for a factual determination of the sufficiency of the property's connections to interstate commerce. Because the record reflects that the Corps' jurisdiction does not extend to the total property, we also remand to determine over which portion of the property the Corps has valid jurisdiction in light of this opinion's legal conclusions. Costs will abide the final determination.

REVERSED and REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part.

I join in the majority's holding that the southern portions of Leslie's property meet the Clean Water Act requirements for Corps' jurisdiction. I disagree, however, with the majority's conclusion that the district court erred in its treatment of the crystallizers and calcium chloride pits.

The crystallizers and pits are seasonal bodies of water that derive their major source of water from rain. There is standing water in the crystallizers and pits during the winter rainy season, when the rain collects, until early to mid-spring, when all the water has evaporated. The rest of the year the crystallizers and pits are dry. Although the majority is correct that "the seasonal nature of the ponding is no obstacle to Corps' jurisdiction," the cycle of ponding in the crystallizers and pits creates no hydrological connection with any other body of water. This fact distinguishes *Quivara Mining Co. v. EPA,* 765 F.2d 126 (10th Cir. 1985) and *United States v. Phelps Dodge,* 391 F.Supp. 1181 (D. Ariz. 1975). Even though three fish may have found their way into one of the ponds, there is nothing in the record to show that water flows directly or indirectly from the crystallizers or pits into another body of water.

That being the case, the district court correctly determined that the crystallizers and pits are not "other waters" within the meaning of section 328.3(a)(3). It is therefore unnecessary to reach the issue on which the Supreme Court has declined to rule, *see United States v. Riverside Bayview Homes,* 474 U.S. 121, 131 n.8 (1985): whether the Clean Water Act extends Corps' jurisdiction to waters that are not "adjacent to bodies of open water."[1]

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[1] The majority holds that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." Congress does have power under the Commerce Clause to regulate wildlife and endangered species. *Palila v. Hawaii Dep't of Land and Natural Resources,* 471 F.Supp. 985 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981) and *Hughes v. Oklahoma,* 441 U.S. 322

(1976) stand for that proposition. However the issue in this case is not whether Congress has the power under the Commerce Clause to regulate wildlife and endangered species, but whether Congress meant to extend Corps' jurisdiction under the Clean Water Act to the full extent of its commerce clause power. Specifically, it is: is it reasonable for Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as a habitat? In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the other opinion on which the majority relies, the lake was used for several purposes that established a connection to interstate commerce. It is unclear whether the *Marsh* court would have found a substantial enough effect on interstate commerce, and thus Corps' jurisdiction under the Clean Water Act, had the only connection to interstate commerce been that "the lake was on flyway of several species of migratory waterfowl . . . ." *Id.* at 803.

In addition, in *Riverside Bayview Homes* the Supreme Court held that since the Corps' asserted jurisdiction over adjacent wetlands was brought to the attention of Congress "through legislation specifically designed to supplant it" (Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act, H.R. Rep. No. 95-139 pp 1-2 (1977)), and Congress rejected efforts designed to curb that jurisdiction, that was "at least some evidence of the reasonableness of the [Corps'] construction." 474 U.S. at 137. Such evidence of reasonableness does not exist in this case. The Corps issued new regulations governing its regulatory programs on November 13, 1986 in order to clarify the scope of the Section 404 permit program. The new regulations placed the definition of "waters of the United States" into a new Part 328 of Title 33 of the Code of Federal Regulations. As a further clarification, and as an addition to the old regulations, the new regulations stated that "waters of the United States" also include the following: areas which are "or would be" used as a habitat for migratory birds or endangered species. 33 C.F.R. § 328.3(a)(3). This 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the Clean Water Act of 1977. Therefore, the evidence of reasonableness that the Supreme Court found regarding the Corps' regulations in *Riverside Bayview Homes* does not apply to the 1986 clarification of those regulations, in particular, the list that includes migratory and endangered species habitats.

Appendix B

Leslie Salt Co., a Delaware corporation,
Plaintiff,

v.

The United States of America: John O. Marsh, et al.,
Defendants.

United States of America,
Plaintiff,

v.

Leslie Salt Co., a Delaware corporation,
Cargill Inc., a Delaware corporation,
Defendants.

Nos. C-85-8615-CAL, C-86-4187-CAL.

United States District Court,
N.D. California.

Sept. 29, 1988.
As Amended Jan. 11, 1989.

OPINION

LEGGE, District Judge.

These cases were tried to the court, sitting without a jury. The cases were then argued and submitted for decision following the completion of briefing. The court has heard and reviewed the testimony of the witnesses, and has reviewed the designated deposition transcripts, the exhibits, the designated discovery responses, the record of the case, and the applicable authorities. This opinion constitutes the court's findings of fact and conclusions of law, as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

I. Parties

Leslie Salt Co., a Delaware corporation, is the plaintiff in C-85-8615 and a defendant in C-86-4187. Cargill Inc., a Delaware

corporation, is the owner of Leslie Salt Co. and is also a defendant in C-86-4187. Those parties will jointly be called "Leslie" in this opinion. The United States of America is the plaintiff in C-86-4187 and the defendant in C-85-8615. The Secretary of the Army, the United States Army Corps of Engineers, and certain officers of the Corps of Engineers are also defendants in C-85-8615. The United States, the Secretary, the Corps and its officers are collectively called the "Corps." The Save San Francisco Bay Association, Inc., and the National Audubon Society were granted leave to intervene as defendants in C-85-8615.

II. Jurisdiction of the Court

There is no dispute between the parties as to the jurisdiction and venue of this court. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1345, 1346, and 2201-2202, 33 U.S.C. §§ 406 and 1319(b). The property in dispute is located in this district, and venue is proper under 28 U.S.C. §§ 1391(b), 1391(e) and 1402, and 33 U.S.C. § 406 and 1319(b).

These actions arose when the Corps issued a cease and desist order to Leslie pertaining to Leslie's activity on certain property that Leslie owns in the City of Newark, California. The Corps asserted jurisdiction over the property under § 1344 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and subsequently also asserted jurisdiction under § 403 of the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* Leslie filed action C-85-8615 to contest the Corps' jurisdiction over the property. The corps then brought action C-86-4187 to establish its jurisdiction over the property under those two Acts, and claimed that Leslie had violated those Acts in connection with its activities on or connected with the property. The principal, but not the only, question to be resolved is whether the property is a "wetland" within the meaning of the applicable statutes and regulations, and hence is under the jurisdiction of the Corps.

III. Burden of Proof

Before trial the Corps moved for a bifurcation and stay of the action. The motion in essence asked this court to refer the central

issue in this case—whether the property is under the jurisdiction of the Corps—to the Corps for its administrative decision. That decision would have then been reviewable by this court under the Administrative Procedure Act, 5 U.S.C. § 706. The record for that review would have been confined to the Corps' decision and its administative record, and the review would have been under the limited standard of whether the Corps' decision was arbitrary, capricous, [sic] an abuse of discretion, or contrary to law. This court denied that motion and determined that the issues should be tried as plenary actions in this court. *Leslie Salt Co. v. United States,* 660 F.Supp. 183 (N.D.Cal.1987).

At trial, the Corps acknowledged that the burden of proof in this plenary civil trial is the preponderance of the evidence. However, the parties disagree about what must be proved. Leslie contends that it has the burden of showing that the Corps lacks jurisdiction over its property. The Corps contends that Leslie must prove that the Corps' assertion of jurisdiction is arbitrary and capricious.

The basis for the Corps' argument is the well-settled principle that an agency's interpretation of a statute which it administers is generally entitled to substantial deference, as is the agency's interpretation of its own regulations. *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). Under this principle, the court must accept the agency's interpretation so long as it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985).

The court cannot determine whether the Corps has jurisdiction over Leslie's property with no reference at all to the Corps' interpretation of the applicable statutes and regulations. However, the Corps' interpretation is not entitled to prevail simply because it is not capricious or arbitrary. The issue is whether it "is *reasonable,* in light of the language, policies, and legislative history of the Acts for the Corps to exercise jurisdiction." *Id.* at 131, 106 S.Ct. at 461 (emphasis added).

The standard of reasonableness requires evaluating the evidence in light of the language of the Clean Water Act, the Rivers and Harbors Act, and the applicable regulations under those Acts. That requires consideration of a number of factors, including the degree of the Corps' scientific or technical expertise necessarily drawn upon in reaching its interpretation, the consistency of the interpretation within the Corps, the length of adherence to the interpretation, and the explicitness of the Congressional grant of authority to the Corps. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 910-11 (5th Cir.1983).[1]

This is the standard which this court has followed in this case. The court emphasizes that this reasonableness standard does not affect the parties' evidentiary burdens in proving disputed factual issues. Deference does not require the court to accept the Corps' version of the evidence. And the facts stated in this opinon are found by this court to be facts by a preponderance of the evidence.

IV. The Role of the Court

Underlying the legal and factual issues to be decided in this case is the financial question of what use will be made of the property. It is obviously a valuable piece of commercial property, and Leslie seeks to develop it. By asserting jurisdiction, the Corps seeks to preclude or restrict that development, and in essence to maintain the property in its present undeveloped state.

This case therefore involves a balance between the rights of private property on the one hand, and the interests of the government and the public on the other. The scale for measuring that balance is defined by Congress in the Clean Water Act and the Rivers and Harbors Act.

The role of this court is not to sit as a super-ecologist. That is, it is not the function of this court to decide what *should* be done with the property in the best interests of ecological balance. If

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[1] If the court determines that the Corps has jurisdiction, certain decisions would then be made by the Corps under its administrative processes.

that were the court's function, this court would probably say that the San Francisco Bay Area has too much development and that more land should be left undeveloped. But that is not the court's function. This court's role is to define what Congress did under the Acts, to define what powers the Corps has been given by Congress and by the regulations, and to apply those definitions to the evidence which the court has heard about the property. In order to restrict or prevent Leslie's right to develop its property, the court must find from the evidence that the property is within the jurisdiction of the Corps under those Acts and regulations. That is the extent of the judicial power in this dispute.

V. The Property

The property is owned by Leslie. It totals one hundred fifty-three acres, divided by a road into two parcels of approximately one hundred forty-three acres and ten acres. Except where there is a reason to distinguish between them, both parcels will be collectively called the "property."

The property is located in the City of Newark, Alameda County, California. It is surrounded on all sides by roads and highways. The one hundred forty-three acre parcel ("parcel 143") is bounded on the north by State Highway 84, on the west by Thornton Avenue, on the south by relocated Jarvis Avenue, and on the east by Jarvis Avenue, with residential subdivisions of the City of Newark lying east across Jarvis Avenue. The ten acre parcel ("parcel 10") is located across relocated Jarvis Avenue to the south of parcel 143 and is bounded by Thornton and Jarvis Avenues.

Across Thornton Avenue to the west of the property is the San Francisco National Wildlife Refuge, situated on land which was previously taken from Leslie by condemnation action of United States. The nearest navigable water is Newark Slough, which is approximately one quarter mile from the southernmost tip of the property, and that point is approximately two miles from San Francisco Bay.

Parcel 143 consists of areas of differing characteristics which are important for purposes of this litigation. Approximately the

eastern one-third of the parcel is pastureland. Located on the pastureland are two pits, which were formerly used by Leslie for the deposit of calcium chloride. The remaining two thirds of parcel 143 constitutes land surface which Leslie previously used as crystallizers for the manufacture of salt. The parcel has also been impacted by the construction of highways, a sewer line and ditches, and by plowing, as discussed below. There are no tributary streams or rivers either on or adjacent to the property. The property has never been inundated by tides. The property is drained of water, and is subject to some backflow, through three culverts which run under Thornton Avenue. One is located at the southernmost tip of parcel 10, and runs under Thornton Avenue to Newark Slough. The second is located near the intersection of Jarvis and Thornton, and runs under Thornton Avenue onto the wildlife refuge. The third is located approximately halfway up Thornton Avenue, and also runs under Thornton Avenue and onto the wildlife refuge.[2]

For purposes of this case, the condition of the property must also include consideration of weather. The San Francisco Bay Area has what is called a Mediterranean climate. That is, rain is not consistent throughout the year, but occurs primarily in the winter months with little or no rainfall during the balance of the year. Since the climate is wet in one season and dry the remainder of the year, the amount of water on the property will vary over the year. As a result, observations and scientific tests on the "wetness" of the land will depend in part on when the observations and tests are made.

VI. History of the Property

The issue in this case is whether the property *is* subject to Corps' jurisdiction. That decision must be made by examining the characteristics of the property as it now is (or more accurately, as it was in 1985 when the Corps asserted jurisdiction) under the

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[2] This property is not of the same type or location as that discussed in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). The property in that case was, in its natural condition, marshland subject to the ebb and flow of the tide. The present property is not marshland. *Id.* at 745.

definitions of the Acts and the regulations. The inquiry is not the condition of the property at some prior time in its history. Nevertheless, some references to the history of the property are appropriate as being probative of its conditions today. Indeed, even the Corps argues that the formation of the soils in the geological history of the property is relevant to a determination of whether those soils are "hydric" today. The court will therefore briefly discuss the history of the property insofar as its general background is probative of the present condition of the property.

The property was originally acquired by Leslie's predecessors in interest in the late 1800s. A certain portion of the property, primarily the eastern one-third of parcel 143, has been used as pasture and grazing land for livestock since that time. In approximately 1919, Leslie's immediate predecessor in interest began to construct facilities on the property for the manufacture of salt. A railroad spur, a salt refining plant and related buildings were erected. Pits were excavated on the eastern one-third of the property for depositing calcium chloride.

The western two-thirds of the property was made into so-called salt crystallizers, which held salt brine during the final stage of the solar salt production process. The crystallizers were constructed on dry land, by excavating large shallow basins, and leveling and compacting the soil on the bottom to create a level and watertight surface. The excavated soil was used to build earthen levees around the crystallizers to form watertight earthen containers. During the years of their use by Leslie, saturated salt brine (which had been produced by Leslie's evaporation ponds located closer to San Francisco Bay) was pumped through the Coyote Hills and into the crystallizers. Then salt then precipitated and settled onto the bottom of the crystallizers. The remaining liquid was drawn off, and the salt was harvested by large mechanical harvesters that ran across the floor of the crystallizers. The salt was then moved by railcars to a refining plant located on the property. After each harvest of the salt, the crystallizers were drained, releveled, and recompacted.

By 1959 the use of the property to manufacture salt became uneconomical. Since 1959 (with the exception of some limited production in 1962 and 1968), no use was made of the crystalliz-

ers, and that portion of the property has remained dry, except when rainwater accumulates during the winter. Ponds temporarily form after rains, because the floor of the crystallizers has remained relatively watertight as a result of their construction and frequent compaction. Before being plowed in 1983, the crystallizers were generally devoid of any vegetation, due to the compaction and the high salinity of the soil resulting from their prior use in the manufacture of salt.

A dust problem resulted from the dry and barren condition of the crystallizers. Dust blew from their surface onto the neighboring housing tracts across Jarvis road. As a result, Leslie was cited for air pollution violations. In an attempt to control the dust problem, Leslie plowed the property in 1983 and 1985. The plowing had the obvious result of loosening the soil in the crystallizers and creating furrows. That loosening of the soil and creation of furrows resulted in conditions somewhat more hospitable to the growth of plants.

Two other acts of man affect the present character of the property. In the early 1980s, the Eastbay Dischargers Authority constructed a large sewer line across the property. The construction had the effect of disturbing the natural conditions and left fill and inundations on the property. Between 1980 and 1983, Caltrans constructed Highway 84 across the northern part of the property; relocated Thornton Avenue across the western portion of the property; and relocated Jarvis Avenue, dividing the property into the two parcels. These construction activities by Caltrans resulted in the creation of highways, roadbeds, ditches, and drainage facilities, including culverts under Thornton Avenue. The Caltrans construction also breached a levy on the wildlife refuge and destroyed an inflow control that had prevented Newark Slough from flooding the refuge area. The Caltans construction was also apparently responsible for the destruction, or the keeping open, of what had been a tidegate on one of the culverts under Thornton Avenue. Leslie has asked Caltrans to put a floodgate on one of the culverts, but Caltrans has declined because of the controversy over the issues in this case.

That is the present condition of the property. For purposes of this discussion and the Corps' claim of jurisdiction, the property

can be discussed by reference to the following segments: (a) the western two-thirds of parcel 143, which is the former crystallizer area; (b) the eastern one-third of parcel 143, which has primarily been pastureland; (c) the calcium chloride pits dug on that eastern one-third; (d) parcel 10; and (e) the physical characteristics created by the Caltrans and the sewer construction.

What significance is to be given to the fact that certain of the present features were man-made? The Corps takes the position that this fact should be ignored. Leslie argues that the court should not consider the impact of changes that were made to the property by others without Leslie's consent.

The significant man-made changes to the property include the construction by Caltrans discussed above. In addition, the United States extended some of the drainage ditches across the wildlife refuge to Newark Slough, for the purpose of carrying tidewater onto the refuge in order to create a wetland environment there. Despite requests from Leslie, neither the United States nor Caltrans has installed effective tide control mechansims on the culverts or ditches, with the result that some water occasionally reaches the edges of Leslie's property in the culverts and ditches. Leslie has attempted to install floodgates on the ditches, but these mechanisms were either opened or removed by others.

The court agrees generally with the Corps that the impact of human activity is not, in the usual case, relevant to the Corps' jurisdiction under the Clean Water Act. If a water body is a "water of the United States," it does not matter how it came to be so. *See, e.g., United States v. Akers,* 651 F.Supp. 320, 322 (E.D.Cal.1987); *Track 12, Inc. v. District Engineer,* 618 F.Supp. 448, 450 (D.Minn.1985).

The situation in this case, however, is not typical. The reported decisions on the significance of man-made alterations have involved properties that were indisputably "wetlands," or were otherwise "waters of the United States." In addition, those cases did not involve acts of man that were taken without the consent of, and over the protest of, the owner of the property.

In this case, the Corps flooded the wildlife refuge and thereby brought tidewater further inland, reaching the edges of Leslie's

property. Moreover, the Corps and Caltrans have refused to install tide control mechanisms that would prevent water from reaching the property, and the Corps has prevented Leslie from maintaining such devices. The Corps has in essence tried to expand its own jurisdiction by creating some wetland conditions where none existed before.

Such actions by a government agency undermine the balance struck by Congress between regulation and private ownership. This court therefore concludes that the impact of backflow of water over the wildlife refuge and through the culverts and Caltrans drainage ditches should not be considered in determining the Corps' jurisdiction.

This conclusion is consistent with *United States v. City of Fort Pierre,* 747 F.2d 464 (8th Cir.1984). In that case, a dry slough bed began to exhibit wetland characteristics as a result of the Corps' dredging activity on a nearby river. The court held that the effects of the acts of the Corps should be disregarded in determining Clean Water Act jurisdiction, because "[t]o decide otherwise would allow the Corps to enlarge its jurisdiction beyond the scope originally intended by Congress." *Id.* at 467. This court believes that this principle applies in this case.

The government's reliance on *Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) in this case is misplaced. In *Swanson,* the Court held that when the Corps constructed a new dam, its jurisdiction was correspondingly extended to the new high water mark. However, in that case, Congress explicitly approved the dam construction. In this case, Congress did not approve the creation of wetland conditions on Leslie's property. The government argues that Congressional approval of the construction of the wildlife refuge authorizes an expansion of Corps' jurisdiction over Leslie's property. However, Congressional approval of a project does not amount to a sanction for all consequences of the project, only those that are part of it. Congress approved a wildlife refuge of a certain dimension; it did not approve a wildlife refuge that was self-expanding. *Swanson* does not stand for the proposition that an agency can expand its own jurisdiction; it merely reinforces the truism that Congress may give, and Congress may take away, the regulatory jurisdiction of agencies.

VII. The Corps' Assertion of Jurisdiction

The events which led the Corps to assert jurisdiction over the property occurred in October 1985. Leslie began digging a feeder ditch and siltation pond on a portion of the former crystallizers. When the Corps became aware of this, a representative of the Corps visited the property and conferred with Leslie. The Corps then issued a telegraphic cease and desist order, and later a letter asserting jurisdiction.

A second event occurred in 1986-87 with respect to parcel 10. Leslie plugged one end of the culvert leading from that parcel to Newark Slough, in order to prevent water from backing up through the culvert and onto the parcel. The Corps objected to that activity and issued a cease and desist order.

Although Leslie contests the Corps' jurisdiction to issue those cease and desist orders, Leslie has not taken any steps in violation of them while this litigation has been pending.

The Corps asserts jurisdiction over the vast majority of the property, under numerous subsections of the Acts and regulations; *see* exhibit 639. The actual extent of its claim of jurisdiction is marked on a map which is exhibit 640. Leslie denies that any of its property is subject to Corps jurisdiction. It admits that certain small portions in the southernmost tip of parcel 10 and in the southwest corner of parcel 143 may exhibit wetland conditions at certain times of the year, and that water occasionally backs up through the culverts and into the Caltrans ditches. However, as stated above, Leslie contends that those conditions should not be considered for purposes of this case, because they resulted from activities of the United States and Caltrans to which Leslie did not consent.

VIII. Rivers and Harbors Act

Has Leslie violated §403 of the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq.* That issue first of all depends upon whether Leslie's property is subject to the jurisdiction of that Act.

Section 403 in essence prohibits the "creation of any obstruction . . . to the navigable capacity of any of the waters of the

United States," and the alteration of the condition or capacity of any "navigable water of the United States." A general definition of the term "navigable waters of the United States" is set forth in 33 C.F.R. § 329.4. And the extent of Corps' jurisdiction under the Act and the regulation has been interpreted in *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir.1978). As interpreted by the Ninth Circuit, the Corps' jurisdiction under that Act extends only to the portions of property that are "covered by the ebb and flow of the tide to the mean high water mark . . . in its unobstructed natural state." *Id.* at 753.

The evidence established, and the Corps concedes, that none of Leslie's property is below the mean high water line, except certain elevations in the culverts under Thornton Avenue and in certain low-level portions of the drainage ditches constructed by Caltrans. However, the court has concluded for the reasons discussed above that the impact of these structures should not be considered in determining the extent of the Corps' jurisdiction over Leslie's property.[3] The court also finds that even if the culverts and ditches were considered, the evidence is not sufficient to establish that Leslie's property is subject to the jurisdiction of the Act as defined in *Leslie v. Froehlke,* above. Therefore, the court finds and concludes that the acts of Leslie did not violate the Rivers and Harbors Act.

IX. Clean Water Act

Congress passed what is now called the Clean Water Act in 1972, and has subsequently made several amendments. 33 U.S.C. § 1251, *et seq.* Congress did so acting under its Commerce Clause powers. It stated that its legislative objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress' concerns in the Act were obviously with pollution of the nation's *waters*, and not with all forms of pollution throughout the United States.

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[3] 33 C.F.R. § 329.8(a) should not apply when the artificial condition was created against the owner's consent.

Under the [illegible] certain activities are prohibited or limited. Among those is "the discharge of any pollutant." 33 U.S.C. § 1311. And Congress defined "pollutant" to include the dumping of fill. 33 U.S.C. § 1362(6).

The primary section with which we are concerned in this case is section 404 of the Clean Water Act, 33 U.S.C. § 1344. In subsection (a), Congress gave to the Corps the power to issue permits, and necessarily to deny permits, for the "discharge of dredged or fill material into the navigable waters." Congress defined the term "navigable waters" to mean the "waters of the United States." 33 U.S.C. § 1362(7). Congress did not define the term "waters of the United States."

Congress therefore gave the Corps jurisdiction to regulate the discharge of fill into the "waters of the United States." This circuit has said that the jurisdictional terms of the Act are to be given the broadest possible interpretation under the Commerce Clause of the constitution. *Leslie Salt Co. v. Froehlke,* 578 F.2d at 755. However, the Ninth Circuit has not defined the maximum limits of the Corps' jurisdiction under the Act. *Id.* at 756. And it is obvious from the statute and the definitions of Congress that the Corps' jurisdiction does not extend to dry land; it extends only to that which is properly "waters of the United States."

As stated, neither Congress nor the courts have defined the term "waters of the United States." The Corps has defined that term in its regulations. 33 C.F.R. § 328. The regulation states that its purpose is to define "the term 'waters of the United States' as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 C.F.R. § 328.1.[4]

The primary subsection with which we are concerned here is § 328.3, which defines the terms used to describe property subject to the jurisdiction of the Corps. It is necessary to study some of

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[4] Other regulations of the Corps, including the regulations dealing with the issuance of permits if the Corps has jurisdiction, are contained in 33 C.F.R. §§ 320-330.

this language in detail, and the applicable portions of the regulations are set out below.[5]

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[5] § 328.3 Definitions.

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

. . . .

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

. . . .

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. . . .

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

. . .

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

The decisions to be made with respect to the regulations in this case are primarily ones of fact. That is, giving the Act and the regulations the broad interpretation defined by the U.S. Supreme Court and the Ninth circuit, does the evidence establish that the property is or is not within the definition of "waters of the United States?"

Before discussing the evidence and the language, the court notes that there are two conditions that clearly do not invoke the Corps' jurisdiction. First, land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain. Any land subjected to enough temporary rainfall will collect water which stands until it runs off or percolates into the ground. Such temporary collection of rain does not convert the land to a water. Second, land does not become a water of the United States simply because water drains off of the land and ultimately—through ditches, culverts, rivers, sewers, or the like—flows into waters of the United States. If such drainage made land "waters of the United States," then all property located on elevations, no matter how high, above a water of the United States would become "waters of the United States." But drainage off of land is not enough to make it a water of the United States. Not until flowing water becomes a "tributary" is it deemed to be a water of the United States, 33 C.F.R. § 328.3(a)(5), and the Corps does not contend here that the water that drains from Leslie's land is a tributary.

The court turns now to an examination of the evidence and the portions of 33 C.F.R. § 328.3 under which the Corps claims that Leslie's property is a water of the United States.

A. The Ebb and Flow of the Tide

The first is § 328.3(a)(1). That includes "all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.4(b) provides that the tidal waters of the United States extend to the high tide line. The same term is used in section 328.3(d).

It is clear from the evidence that virtually all of the Leslie's land lies above the high tide line. The property has never been inundated by tides. The only portions that are subject to any ebb and flow of the tide are low elevations in the ditches constructed

by Caltrans, and certain small portions at the southernmost tip of the parcel 10 and the southwestern tip of parcel 143. That water gets there by backing up through one of the culverts running from the wildlife refuge under Thornton Avenue.

The Corps concedes that its jurisdiction does not cover drainage ditches that are dug on dry land. Regulation section 328.3(f) defines tidal waters as those that "rise and fall in a predictable and measurable rhythm." The tidal waters end "where the rise and fall of the water surface can no longer be practically measured." Id. The court finds and concludes that the water that does reach Leslie's land is not tidal water. The water comes from the bay, approximately two miles up Newark Slough, over the lands flooded by the United States for the wildlife refuge, and through culverts. The testimony of the government's witness that there might actually be tidal flow onto Leslie's property was not supported by sufficient objective data. And the court finds that any tidal impact cannot be practically measured.

As stated above, the court also believes that the principle stated in *City of Fort Pierre*, 747 F.2d at 467, is applicable here. That is, it is primarily the flooded condition of the wildlife refuge across Thornton Avenue from Leslie's property that results in the flow of water through the culverts under the road. The evidence is clear that the property was not impacted by any inundation until the construction of the culverts. And since the United States created that condition by the flooding and maintenance of the wildlife refuge, it cannot assert jurisdiction as a result of its maintenance of that causal condition.

The court finds and concludes by a preponderance of the evidence that the property is above the high tide line and is not "subject to the ebb and flow of the tide."

B. Isolated Waters or Wetlands

The second subsection under which the Corps asserts that a portion of Leslie's property is a water of the United States is § 328.3(a)(3):

> (3) All other waters such as intrastate lakes, rivers, streams (including intermitent streams), mudflats, sandflats,

> wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

This subsection has come to be called the "isolated" wetlands or waters provision. The general thrust of this subsection is that certain waters or wetlands may be waters of the United States even though they are physically unconnected with other waters of the United States. The jurisdictional nexus for including such isolated waters within federal jurisdiction is stated in the three subsections of (a)(3); that is, some connection with interstate travel or commerce.

To establish that interstate connection here, the Corps relies upon comments made about § 328.3(a)(3) in the Federal Register where the Corps issued the final regulations. 51 Fed.Reg. 41,206, 41,217 (Nov. 13, 1986). The comments state that the Corps adopts the definitions of the Environmental Protection Agency,[6] which includes consideration of the use of the property as habitat by migratory birds and endangered species. There was evidence at trial that the property is occasionally used by migratory birds, and one endangered species of mouse was found at one location on the property. The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use. Leslie contends that Congress did not intend migratory birds or endangered species to be "interstate commerce" under the Clean Water Act, and that even if it did, such

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[6] And the Environmental Protection Agency's general counsel opinion of November 19, 1985.

an extension of jurisdiction would not be constitutionally permissable.[7] However, this court need not reach those questions.

Before the interstate commerce connections are considered under the three subsections of (a)(3), the property must itself be "other waters" as described in section (a)(3). The Corps contends that the portions of the Leslie property which are such "other waters" are the calcium chloride pits and the former crystallizers during such periods as rainwater collects in them. The listing of "other waters" in section (a)(3) includes "lakes, rivers, streams . . . mud flats, sand flats . . . sloughs, prairie potholes, wet meadows, palaya [sic] lakes, or natural ponds.[8]" Giving those terms their common sense meanings, the court finds that neither the crystallizers nor the calcium chloride pits are "other waters."

Even if the phrase "such as" in front of those terms is interpreted, as it should be, to mean that the list is not exclusive, the definition of "other waters" is still limited to items of the same kind or class as those listed. *See Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 600-01, 83 S.Ct. 926, 928-29, 10 L.Ed.2d 1 (1963); 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973). The items listed are all natural water conditions, and not artificially created structures.

The calcium chloride pits and former crystallizers were dug for use in manufacturing salt. They are not natural water conditions and are in fact dry most of the year. Even if the regulation is interpreted as extending the definition to include artificially created water bodies, the mere ponding of water on otherwise dry land is not enough to convert that land into "other waters."

This conclusion finds support in the Corps' statements concerning the regulations. The comments to the final regulations promulgated in 1986 state, "For clarification it should be noted that we do not consider the following waters to be 'Waters of the

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[7] The U.S. Supreme Court, in *Riverside Bayview Homes*, 474 U.S. at 131 n. 8, 106 S.Ct. at 462 n. 8, expressly declined to rule on isolated wetlands issues.

[8] "The definition also includes "wetlands," which the court will discuss below under that specific provision of the regulation.

United States.' . . . Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." 51 Fed.Reg. 41,206, 41,217 (Nov. 13, 1986). The calcium chloride pits and former crystallizers are types of settling basins, and would not, under these comments, be considered "waters of the United States" even if they were still operating and holding quantities of brine. The same conclusion is apparent when, as in recent years, water is no longer being pumped onto the property.

The court therefore finds and concludes that Leslie's properties are not "other waters" under 33 C.F.R. § 328.3(a)(3).

C. Wetlands

The Corps contends that virtually all of Leslie's property is a "water of the United States" because it is a "wetland." The Corps' jurisdiction over wetlands is contained in 33 C.F.R. § 328.3(a)(7). "Wetlands adjacent to waters. . . ." The term "wetlands" is defined in section 328.3(b) as

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Most of the evidence at trial focused upon whether Leslie's property meets that definition. Both sides generally agreed that in making that decision, three primary indicators must be examined: (1) the water on the property ("hydrology"), (2) the condition of the soils, and (3) the extent and nature of the plant life. Those evaluations are made more difficult by the fact that the climate has distinct rainy and dry seasons, and the observations will vary depending upon when the indicators are examined.

The various and interrelated subportions of the definition of "wetland" in section 328.3(b), and the evidence pertaining to them, will be discussed below. However, by first looking at that definition as a whole, it is apparent that the primary indicator is

the vegetation. That is, the land must be sufficiently wet for a sufficient duration to support a prevalence of vegetation which is typically adapted for life in saturated soils. Bare land does not meet the definition. And vegetation does not do so unless there is a prevalence of vegetation typically adapted for life in saturated soils.[9]

The first part of the definition requires that the area be "inundated or saturated."[10] It was clear from the testimony that the property as a whole is not inundated or saturated by any tidal or "wash" action. The source of inundation and saturation of this property, if there is any, can only be rain. It was also clear that the property could be called "inundated" only during and for a short time immediately after winter rains.

The term "saturated" is not defined by the statute or the regulations. But the witnesses appeared to agree on its definition; that is, containing water to a point where the soil can hold no more water and oxygen in the soil is shut out.

Experts on both sides conducted extensive tests of the hydrology and of the soils to make a determination as to whether the property is inundated or saturated. Various tests were used in an attempt to measure the hydrology and degree of saturation. The results of each of those tests, and the specific methods and measures used by the experts, need not be discussed in detail. In general, the studies included analyzing the type of soil, the amount of oxygen in the soil, the amount of water in the soil, the color of the soil, and the amount of reduction of other chemicals.

Water has to be present in the vegetation root zone (by whatever number of inches the depth of that zone is measured) in

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[9] Some comment is appropriate regarding the term "vegetation." The testimony demonstrated that at certain times of the year algae or alginates form on certain areas of the property. However, the witnesses were unanimous in their conclusion that algae is not "vegetation." That term requires a morphological type of structure. And further, algae can form in a wet condition in a matter of a few days.

[10] It makes no difference in this definition whether the inundation or saturation is by surface water or by ground water.

order for the area to be a wetland. The root zone of this property reaches levels of saturation only during the rainy season. After the runoff of each rain, the root zone is not saturated. Those conclusions are true as to the property as a whole. They are also true as to the crystallizers, whether examined before their plowing or after, except that plowing did increase the temporary puddling of rainwater. The Corps' evidence did not establish the existence of saturation in the root zone area.

The Corps also contends that certain soils on the property are "hydric" by reason of their geological definition. That is, geologists use that term in describing certain types of soil. But that definition generally pertained to soils in layers well below the root zone, and to the wetness conditions when those layers were laid down in long-past geological history. Use of the term "hydric soils" does not really assist in a determination of whether the root zone soil meets the requirements of the regulations.

The Corps also argues for application of the principle of capillary rise; that is, water rises by capillary action from the water table up into higher layers of the soils. The court is prepared to accept this principle of physics. But the evidence was that even capillary rise did not necessarily reach the soils in the root zone. And indeed, even areas affected by capillary rise do not necessarily reach a saturated condition.

The court finds from weighing and evaluating all of the evidence, both percipient and expert, that the property is not "inundated or saturated."

After a rain that is heavy or long enough, any soil will become temporarily saturated. But that is not enough for a determination of wetland under the regulations. The regulations go on to state that the saturation must be "at a frequency and duration" sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. § 328.3(b). The court finds from an evaluation of the evidence that there is not such a frequency or duration. As stated, it is simply not enough that rain water collect on property for a few days for that property to become a water of the Untied States.

The next requirement under regulation 328.3(b) is that the inundation or saturation be sufficient to support, and "under normal circumstances" does support, relevant types of vegetation. The U.S. Supreme Court has noted that this excludes upland areas that for some aberrational reason have some wetland-type vegetation. *Riverside Bayview Homes*, 474 U.S. at 130 n. 7, 106 S.Ct. at 461 n. 7. The Corps acknowledges that its jurisdiction should not extend to "abnormal" conditions, but should pertain to truly aquatic areas; see exhibits 205, 209, 574. The evidence of the "normal circumstances" of the property again focused on the hydrology, the soils, and the vegetation. The evidence included both the present condition of the property and some recent history. And again, the finding of "normal circumstances" is made difficult by the seasonal nature of the rainfall.

It is clear that the eastern one-third of the property, both historically and under present conditions, has been pastureland supporting primarily upland and not wetland vegetation. The area of the crystallizers was not able to support much vegetation of any type, because it had been highly compacted and because its use in the manufacture of salt resulted in very saline soil. This condition was changed somewhat by the plowing of the crystallizers, which made them more hospitable to plant life. However, even since then the plant life has been sparse and has been limited in duration to the rainy season. It is unclear whether the Corps considers the "normal circumstances" to be before or after the plowing. But in either event, the court finds that the salt crystallizer area could not support the relevant types of vegetation under normal circumstances.

Some areas of the crystallizers have been disturbed by the Caltrans construction and by the construction of the sewer line, leaving those areas in an altered condition. The court is willing, as urged by the Corps, to consider those present conditions as "normal" circumstances. Even so considered, the evidence compels the conclusion that during the vast majority of the year there is little or no vegetation on the crystallizer area.

Two areas in the southern corner of parcel 10 and in the southwest corner parcel 143, as well as some of the Caltrans ditches, do support vegetation of the relevant type. But circum-

stances in those areas are not "normal," because the ability to support vegetation was caused primarily by the government's flooding of the wildlife refuge across Thornton Avenue. And those conditions in those very small areas, even if accepted as normal, are not reflective of the normal circumstances of the property as a whole.

The next requirement under regulation 328.3(b) is that the property support a "prevalence of vegetation . . . " There is a difference between the parties as to what the term "prevalence of vegetation" means. Leslie interprets the requirement to mean that in looking at the condition of the ground as a whole, there must be a prevalence of vegetation. On the other hand, the Corps interprets the phrase to mean that if there is *any* vegetation on the land, all that is required is that the prevailing vegetation be of a type which is adapted for life in saturated soil conditions. This court believes that the Corps' interpretation is not reasonable. First, the Corps' position would compel the conclusion that if there were only *one* plant on a large parcel of ground, but if that one plant were adapted for life in saturated soil, then the entire parcel must be a wetland. That position defies the common sense meaning of the word "wetland." Second, the Corps' interpretation is contrary to its own guidance manual on making wetland determinations. The manual requires that *before* determining the issue of the type of vegetation, a finding must first be made that vegetation is the predominate condition of the property. Indeed, in other areas of the United States the Corps does not agree with the interpretation being advanced as to "prevalence of vegetation" in this case. Finally, the Corps' interpretation appears contrary to the definition of wetland in section 328.3(b) read as a whole. When all the sub-clauses of 328.3(b) are read together, it is clear that the predominate condition of the land must be vegetation, and that the vegetation must be plants that can live in saturated soil conditions.

Leslie contends that the prevalence requirement means that fifty percent or more of the site has to be covered by vegetation. This court need not set any exact percentage requirement for prevalence, since it is clear from the evidence in this case that the

prevalence requirement has not been met under any reasonable standard regarding the questioned portions of the property.

The court finds from the evidence that the salt crystallizer areas have not and do not support a prevalence of vegetation. This finding is based upon the testimony describing the property, the historical condition of the property leading up to the "normal" conditions of today, aerial photographs taken over a period of years, and the fields [sic] notes and reports of the experts who examined the area.[11] There was no plant growth in the calcium chloride pits. With respect to the crystallizers, it is clear even from the Corps' evidence that no plant life exists in some areas, and in other areas plants cover only up to one percent of the ground. And many of the plant types identified by the Corps live only during the immediate rainy season and die shortly thereafter. The Corps' witnesses nevertheless testified that those plants were adapted for an annual life cycle that includes dormancy during long dry periods. However, this court questions whether plants that are dead for as much as nine months of the year can meet a "prevalence of vegetation" requirement.

The final clause in the definition of "wetland" requires that the prevalent vegetation be of a type "typically adapted for life in saturated soil conditions." Botanists divide plants into roughly five categories for purposes of determining such adaptation. Those categories define the likelihood of a particular plant being found in saturated soil conditions. They range from those which are found in saturated conditions ninety-nine percent of the time, to those which are not listed and hence are rarely if ever found in saturated soil conditions. Whether a specific plant falls into a particular category may depend upon who is preparing the list. But there is a high degree of consistency in most of the lists.

The court heard extensive evidence on the types of plants found on the property and the nature and characteristics of those plants. On the eastern one-third of the property, the prevalent vegetation

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[11] At the time of the construction of the freeway, the U.S. Fish & Wildlife Department urged that the highway interchange be put where it is, in the middle of the former crystallizers, because that location for the interchange was one of very low environmental impact.

is upland grasses which are typically not adapted for life in saturated soil conditions. A few plants of a type which are typically adapted to such soil conditions (either highly likely or at least a positive indicator) were found during rainy months in certain of the plowed furrows in the former crystallizers and along the Caltrans ditches. The damper areas on the southernmost tip of parcel 10 and on the southwestern corner parcel 143 also contained such plants.

The court finds from the evidence as a whole that Leslie's property does not contain a prevalence of vegetation which is typically adapted for life in saturated soil conditions.

The court therefore finds from the evidence and from the definition of "wetlands" in 33 C.F.R. § 328.3(b), that the Leslie property is not inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances it does not support, a prevalence of vegetation typically adapted for life in saturated soil conditions. It is therefore not a "wetland."

For a wetland to be a "water of the United States," there is an additional requirement. The wetland must also be "adjacent to waters" of the United States. 33 C.F.R. § 328.3(a)(7). The term "adjacent" is defined by subparagraph (c) of section 328.3 of that regulation. There was extensive testimony on whether various portions of Leslie's property, if found to be wetlands, were adjacent to waters of the United States. Since the court has concluded the property is not wetland, this adjacency requirement need not be discussed in detail.

Suffice it to say that the Corps' contentions on adjacency were built upon arguments using a jigsaw pattern of various areas of the property which, if deemed to be wetlands, could be "adjacent" to other areas of the property found to be waters of the United States. Most of those contentions have now been resolved against the Corps, because the contested areas were found not to be waters or wetlands.

One of the arguments of the Corps for adjacency is based upon the property that lies west of Thornton Avenue; that is, Newark Slough and the wildlife refuge, which are connected to the Leslie

property by the culverts running under Thornton Avenue. The court finds and concludes that even if portions of Leslie's property were found to be wetlands, the adjacency requirement has not been satisfied. The reason is that the condition which created the alleged wetland—that is, the flooding of the wildlife refuge and the resulting backing of water through the culverts—was contributed to by the United States itself and cannot under *City of Fort Pierre*, 747 F.2d 464, be considered in the adjacent wetlands determination.

The court therefore finds and concludes that the property is not a "water of the United States" as defined in 33 C.F.R. § 328, and hence is not within the jurisdiction of the Corps under the Clean Water Act.

X. Estoppel

Leslie also asserts that the Corps is estopped from asserting jurisdiction over the property. The argument is based upon actions which the Corps either did or did not take at the time of the Caltrans construction, the construction of the sewer, and the condemnation and use of the wildlife refuge. However, since the court has determined that the property is not "waters of the United States," and hence is not subject to the Corps' jurisdiction, the court need not consider this argument. The court is therefore making no findings of fact and expressing no opinion on Leslie's argument of estoppel.

XI. ATTORNEYS FEES

Leslie has requested an award of attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Since Leslie is the prevailing party, that statute requires an award of attorneys fees and expenses to Leslie unless this court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The "substantially justified" standard requires only that the government's position must have been reasonable in law and fact. *Pierce v. Underwood*, ___ U.S. ___, 108 S.Ct. 2541, 2549-51, 101 L.Ed.2d 490 (1988).

While the court believes that some of the government's evidence and arguments were not reasonable, the court nevertheless concludes that the government's position as a whole was substantially justified and that special circumstances make an award to Leslie unjust. The Corps was motivated by a good faith concern for the objectives of Congress and for the Bay Area ecosystem. It was attempting to act in the public interest. The property has a high commercial value, and the amounts expended in this litigation are a very small percentage of its potential value. The government's evidence, although not meeting the burden of persuasion, does meet the burden of substantial justification for the action as a whole. The court therefore declines to award attorneys fees and expenses to Leslie, although Leslie is of course entitled to recover its costs of suit.

IT IS THEREFORE ORDERED that judgment should be entered as follows:

1. The Corps has no jurisdiction over the subject property under Section 10 of the Rivers and Harbors Act, because the property is not a "navigable water of the United States" within the meaning of the Rivers and Harbors Act or the regulations promulgated under that Act.

2. The Corps has no jurisdiction over the subject property under section 404 of the Clean Water Act, because the property is not a "water of the United States" within the meaning of the Clean Water Act or the regulations promulgated under that Act.

3. Leslie's work on the property did not and does not constitute a violation of the Rivers and Harbors Act or the Clean Water Act, and did not and does not require a permit from the Corps of Engineers.

4. In favor of plaintiff and against defendants and intervenors in action No. C-85-8615.

5. In favor of defendants and against plaintiffs in action No. C-86-4187.

Within fifteen (15) days of this order, Leslie is to submit to the court, and serve on the Corps, a proposed form of judgment that conforms to this opinion.

Appendix C

United States Court of Appeals
For The Ninth Circuit

Leslie Salt Co., a Delaware corporation,
Plaintiff-Appellee,
v.
United States of America, et al.,
Defendants,
and
Save San Francisco Bay Association,
a non-profit California corporation;
National Audubon Society,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.

United States of America,
Plaintiff-Appellant,
v.
Leslie Salt Co., a Delaware corporation; and
Cargill, Inc., a Delaware corporation,
Defendants-Appellees.
CA No. 89-15244
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL
(Northern California)
ORDER
CA No. 89-15337
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix D

(Statutory and Regulatory Provisions Involved)

1. Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), provides as follows:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

2. Section 404(a) of the Clean Water Act, 33 U.S.C. 1344(a), in relevant part, provides as follows:

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

3. Sections 502(7) and 502(12) of the Clean Water Act, 33 U.S.C. 1362(7) and 1362(12), provide as follows:

> Except as otherwise specifically provided, when used in this chapter:
>
> * * * * *
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.
>
> * * * * *
>
> (12) the term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

4. 33 C.F.R. § 328.3(a)(3) provides as follows:

For the purpose of this regulation these terms are defined as follows:

> (a) The term "waters of the United States" means
>
> * * * * *

(3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

5. 51 Fed.Reg. 41217 (Nov. 13, 1986) includes the following comment:

EPA has clarified that waters of the United States at 40* CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

---

* Presumably should be *33* C.F.R.

Appendix E

Department Of The Army
U.S. Army Corps of Engineers
Washington, D.C. 20314-1000

24 Jan 1990

Reply to
Attention of:

CECW-OR

Memorandum For See Distribution

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes v. United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its

adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes,* and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes,* which was limited to the proceedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect

notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters ". . . prairie potholes, wet meadows, [and] playa lakes . . .", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there are any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

Date: January 24, 1990

JOHN P. ELMORE
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental
Protection Agency:

Date: January 19, 1990

DAVID G. DAVIS
Director
Office of Wetlands Protection

Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 90-792

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

vs.

UNITED STATES, SAVE SAN FRANCISCO BAY ASSOCIATION, NATIONAL AUDUBON SOCIETY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAVE SAN FRANCISCO BAY ASSOCIATION AND NATIONAL AUDUBON SOCIETY

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QUESTIONS PRESENTED

1. Whether this case is ripe for adjudication by this Court where the Ninth Circuit's ruling is interlocutory and the case has been remanded to the district court to determine the extent to which, if any, the Army Corps has Clean Water Act jurisdiction over a portion of petitioner's Newark Coyote property used by migratory birds and/or endangered species.

2. Whether the Ninth Circuit's holding is correct that, because Congress intended to extend Clean Water Act jurisdiction to all waters the use, degradation or destruction of which may affect interstate commerce, it is proper for the Army Corps to assert jurisdiction over waters which provide habitat for migratory birds and endangered species.

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No. 90-792

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

vs.

UNITED STATES, SAVE SAN FRANCISCO BAY ASSOCIATION, NATIONAL AUDUBON SOCIETY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAVE SAN FRANCISCO BAY ASSOCIATION AND NATIONAL AUDUBON SOCIETY

The respondents Save San Francisco Bay Association and National Audubon Society respectfully request that this Court deny the petition for writ of certiorari seeking review of the interlocutory opinion of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Respondents Save San Francisco Bay Association and National Audubon Society present the following Statement of the Case to supplement that presented by petitioners Leslie Salt Co. and Cargill, Inc. (hereinafter "petitioner," "Leslie").

Characteristics of Leslie's Newark Coyote Property

The property which is the subject of this lawsuit, known as the Newark Coyote property, consists of 153 acres which is adjacent at its southern end to the Newark Slough, a meandering navigable tidal arm of the San Francisco Bay. District Court Opinion ("DCOP"), *reprinted in* Appendix to Petition at A-19; RT[1] 52, 861; Exh.[2] 733; Exh. 27(b). The property is divided into two parcels, a 10-acre parcel ("Parcel 10") and a 143-acre parcel ("Parcel 143"). *See* Map of Property, Appendix A hereto (which appeared as Appendix A to Respondent U.S.'s Ninth Circuit Opening Brief). The 10-acre parcel is separated from Newark Slough only by a culvert which passes under a road. *Id.* The 143-acre parcel is connected to the Slough by a culvert and a tidal drainage ditch. RT 861; Exh. 734; Exh. 27(b). The Newark Coyote property abuts the 23,000 acre San Francisco Wildlife Refuge, which lies across a road (Thornton Avenue) to the west of the property.

Tidal waters inundate the southern portions of both parcels during high tides that occur on the order of once or twice a month. Ninth Circuit Opinion ("OPIN"), *reprinted in* Appendix

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[1] Citations to RT are to the Reporter's Transcript of the proceedings in the U.S. District Court below and the page number of the Transcript.

[2] Citations to Exh. are to Exhibits submitted in the U.S. District Court below.

to Petition at A-1, 3; Exhs. 733, 715; RT 772, 1088-89, 1127-28, 861, 328-33, 348-49. The Bay tidal waters extend from Newark Slough through the culvert to the southern part of Parcel 10, and across the Wildlife Refuge and through the culvert to the southern part of Parcel 143. As a result of this regular tidal inundation, the southern portions of the two parcels are densely vegetated with pickleweed, a species of salt marsh vegetation. RT 665-66.

The property historically was used for production of salt. RT 108-9. The western two-thirds of Parcel 143 consisted of salt crystallizers. They were constructed by removing the topsoil from the area, using that soil to form a levee around the perimeter of the area, and leveling and compacting the excavated area to form a watertight shallow basin. RT 110. Pits for collecting calcium chloride from the salt brine were constructed on the eastern one-third of Parcel 143. Salt production on the property ceased by the late 1960's. OPIN at A-2; RT 109.

There is ponding in the calcium chloride pits and much of the crystallizers throughout the rainy season (the winter and early spring). RT 575-76, 464, 173, 1715, 667; OPIN at A-2. Some of these areas are "ephemerally ponded," that is, ponded only for a period of days or weeks after rainstorms; other areas are "seasonally ponded," that is, ponded for a period of months throughout the rainy season. Leslie expert Patrick noted that the soil in part of the crystallizer area was saturated for months at a time, and that there was standing water in portions of the crystallizers from November through April. RT 580, 575-76; *see* RT 464. The only reason that he concluded that the area would not qualify as a "wetland" under the Clean Water Act ("CWA") was that it did not have a sufficient plant community (due to the salinity of the soil). RT 580-81.

The calcium chloride pits are particularly aquatic in nature. As petitioner's counsel stated at trial, "They are ponds, which everybody concedes." RT 1715. The testimony indicated that they generally pond water for the major portion of the year (late October to June or July). RT 1483-84.

Most of the plants found in the crystallizers and calcium chloride ponds are obligate wetland species, that is, species that

are found 99% of the time in wetland conditions, and are typically adapted for life in saturated soil conditions. RT 632, 682-88. One of the plants found in the crystallizer furrows and the calcium chloride ponds is "an aquatic plant" that "would only grow in submerged conditions." RT 694, 1215-16. Furthermore, both Leslie and Government experts found evidence of stickleback fish in both the calcium chloride ponds and the crystallizer furrows. RT 677-78, 734, 1181-83 (remains of several hundreds of fish in both crystallizers and calcium chloride pond); OPIN at A-2-3.

More than 59 species of birds have been observed on the property, including numerous species of waterfowl, waterbirds, and water-associated birds. RT 1265-1298; *see also* RT 1239-1262. Fifty-five of those species are birds protected by the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq. RT 1288. Forty of the species found on the site are water or wetland birds. RT 1289.

A table showing the observed bird use of the property in 1983, '85 and '87 shows that large flocks of birds were observed on the property. Exh. 541. Certain areas, including the calcium chloride ponds and portions of the crystallizers, always pond and support waterbird use during the winter-spring months, even in relatively dry years. *See, e.g.,* RT 575-76, 464-65, 173, 1715.

The salt marsh harvest mouse, a rare mouse that lives in the tidal salt marshes around the edges of the San Francisco Bay and its tidal arms, or sloughs, is listed by the United States Fish and Wildlife Service as "endangered" under the Endangered Species Act, 16 U.S.C. section 1531 et seq. Two salt marsh harvest mice were found in the pickleweed area on the southern portion of Parcel 143. RT 1410; Exhs. 558, 651-652. Three additional mice were found on the right of way between Parcel 10 and Thornton Avenue, between one and eleven meters from the property line. RT 1402-10. These mice were living in the southern portion of Parcel 10 and the adjacent right of way. RT 1407.

District Court Opinion

In the trial court, respondents United States and Save San Francisco Bay Association and National Audubon Society argued

that the Army Corps had Clean Water Act jurisdiction over various portions of the Newark Coyote property on several different grounds. Respondents argued that the Corps had jurisdiction over the southern portions of the two parcels on three separate theories: (1) that they were "subject to the ebb and flow of the tide" under 33 C.F.R. § 328.3(a)(1); (2) that they were "adjacent wetlands" under 33 C.F.R. § 328.3(a)(7); and (3) that they were "other waters" subject to Corps jurisdiction under 33 C.F.R. § 328.3(a)(3). Respondents also argued that the Corps had jurisdiction over these portions of the property under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. ("RHA"), because they were subject to the ebb and flow of the tide.

Respondents argued that the Corps had CWA jurisdiction over the crystallizers and calcium chloride ponds on two theories: (1) that these areas were "other waters" subject to Corps jurisdiction under 33 C.F.R. § 328.3(a)(3); and (2) that these areas were "adjacent wetlands" subject to Corps jurisdiction under 33 C.F.R. § 328.3(a)(7). Leslie claimed both that there was no jurisdiction over any part of the property under either the CWA or the RHA and that the Corps was estopped from asserting jurisdiction over the property based on earlier actions taken or not taken by the Corps.

The district court ruled against respondents on all theories of jurisdiction, finding that the Corps had no jurisdiction over any portion of the property under either the CWA or the RHA. The district court found that because Bay tidal water reached the Leslie property as a result of actions taken by state and federal government agencies, that tidal inundation could not be considered in determining whether there was Corps jurisdiction. DCOP at A-29-30. In addition, the district court held that the crystallizers and calcium chloride ponds were not "other waters" because they were artificially created. DCOP at A-32-33. The district court was also apparently troubled by the seasonal nature of the ponding on the crystallizers and calcium chloride ponds. DCOP at A-32. Finally, the district court found that the crystallizers and calcium chloride ponds failed to qualify as "adjacent wetlands" because they did not meet the specific definition of wetlands set forth in the Corps regulations. 33 C.F.R. § 328.3(b). DCOP at

A-39-40. The district court did not reach the estoppel claim raised by Leslie. DCOP at A-40.

Ninth Circuit Opinion

Respondents appealed all aspects of the trial court opinion except the holding that the crystallizers and calcium chloride ponds were not "adjacent wetlands." The Ninth Circuit upheld respondents' appeal. The Ninth Circuit held that the fact that government agencies had caused tidal inundation of the property was not relevant and thus that the Corps did have jurisdiction over the southern portions of the two parcels. Because it found that these portions of the property qualified as "adjacent wetlands," it did not reach respondents' arguments that there was Corps jurisdiction under both the CWA and the RHA due to the ebb and flow of tidal waters. OPIN at A-4, n.5.

The Ninth Circuit did not rule that the crystallizers and calcium chloride ponds were within the Corps "other waters" jurisdiction. Rather than finding Corps jurisdiction over these portions of the property, the court remanded the issue to the district court "to determine if the property has the requisite connections to interstate commerce." OPIN at A-12. The court held only that neither the seasonality of the waters on that part of the property nor the fact that they were artificially created (by Leslie's predecessor) were obstacles to Corps jurisdiction. With respect to migratory birds and endangered species, the court held that the CWA is broad enough to extend Corps jurisdiction to local waters which may provide habitat to migratory birds and endangered species. OPIN at A-12.

Judge Rymer joined in that part of the Ninth Circuit opinion finding CWA jurisdiction over the southern portions of the two parcels. Judge Rymer dissented on the portion of the holding relating to the crystallizers and calcium chloride ponds. Although she agreed with the majority that the seasonal nature of the ponding was not an obstacle to jurisdiction, Judge Rymer opined that these portions of the property should not qualify as "other waters" because she understood that there was "no hydrological connection" between the water in those areas and "any other body of water." OPIN, App. at A-13.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S INTERLOCUTORY DECISION IS NOT RIPE FOR RESOLUTION BY THIS COURT

The interlocutory nature of the Ninth Circuit's ruling makes petitioner's request for certiorari in this case premature. As set forth above, the Ninth Circuit did not find that any part of the crystallizers or calcium chloride pits was subject to CWA "other waters" jurisdiction; it remanded the issue to the district court. OPIN at A-12.

On remand, the district court must make factual determinations regarding migratory bird and endangered species habitat on the property, as well as factual determinations regarding which portions of the property qualify as "waters." If the court finds that there are some waters whose condition affects interstate commerce, the court must then determine how many acres of the property are involved. Alternatively, the district court might decline to reach these issues, holding that the Government is estopped from asserting jurisdiction.

Both the district court's factfinding and its legal analysis will have a great bearing on the appropriateness of granting certiorari. If, for example, the district court were to find that there was CWA jurisdiction over only a one-acre calcium chloride pit that is ponded 9-12 months each year and that supports dozens of species of rare migratory waterbirds, that decision would have a very different meaning than a determination that there was jurisdiction over the entire 100 acres of crystallizers, including parts that never pond for more than a few hours at a time and that only provide potential habitat for non-water-dependent migratory birds. By the same token, the issue posed in Leslie's petition would never arise if the court were to agree with Leslie's estoppel argument.

Denying certiorari now is consistent with the Court's long recognized guiding principle that "by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations."

Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 72 (1961). Thus, the Court has generally disfavored pre-enforcement challenges to regulations allegedly in excess of statutory authority because judicial review "is likely to stand on a much surer footing in the context of a specific application of . . . [a] regulation than could be the case in the framework of . . . [a] generalized challenge. . . ." *Toilet Goods Association v. Gardner,* 387 U.S. 158, 164 (1967). Where, as here, such "surer footing" awaits the outcome of remand proceedings, granting certiorari at the interlocutory stage is premature.

Reviewing the legal issues raised at this stage of the proceedings would only serve as an advisory opinion to guide remand proceedings. The Court has repeatedly refused to issue such advisory opinions on the meaning of a statute or otherwise interpret statutes outside the narrow confines of a particular fact situation:

> "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson v. Buck,* 313 U.S. 387, 402.

Communist Party v. Subversive Activities Control Board, 367 U.S. at 71.

Consistent with its desire to avoid issuing advisory opinions and its preference for deciding legal issues in the context of well-defined fact scenarios, the Court has long held that the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application" for a petition of certiorari. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). *See also American Construction Co. v. Jacksonville, T. & K.W.Ry. Co.,* 148 U.S. 372, 384 (1893). The Court will generally deny a petition for certiorari in a case, such as this one, where the court of appeals has remanded the case to the trial court. *Brotherhood of Locomotive Firemen v. Bangor & A.R.R.,* 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

The Court has rarely shown a willingness to depart from its customary rule of denying review at the interlocutory stage of a case. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. at 258 ("except in extraordinary cases, the writ is not issued until final decree"). The few cases in which the Court has granted certiorari prior to a decision on remand have most often involved the resolution of an important and clearcut issue of constitutional interpretation that is critical to the outcome of the case and that might resolve a conflict with prior decisions of the Supreme Court or another circuit. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945) (certiorari granted at the interlocutory stage to resolve a clear conflict in the federal courts regarding the scope and meaning of the just compensation clause of the Fifth Amendment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (certiorari granted prior to remand to affirm that provisions of abortion law were unconstitutional and in conflict with existing Supreme Court caselaw). However, even the existence of such extraordinary circumstances is no guarantee that certiorari will be granted at the interlocutory stage. *See Michael v. United States*, 454 U.S. 950, 951 (1981) (certiorari denied at the interlocutory stage despite split in circuits over Fourth Amendment question).

Because the Ninth Circuit's ruling has none of the characteristics of those few cases in which certiorari has been granted before remand proceedings, certiorari should be denied here. No constitutional question is raised in this case. While petitioner speculates that the Ninth Circuit's ruling may result in takings claims under the Fifth Amendment (Pet. at 9), no takings claim has been brought.

Nor has petitioner alleged that the Ninth Circuit's holding conflicts with any decisions of the Court or other circuits. Indeed, petitioner can only point to the dissent in the Ninth Circuit opinion and "concerned comments elsewhere." Pet. at 22. A dissenting opinion and "concerned comments" are, alone, no basis for reviewing this interlocutory decision.

Stripped of any pretense that this case raises constitutional issues or involves a conflict among the circuits, it becomes clear that petitioner is making an extraordinary request for interlocu-

tory review in a very ordinary case of statutory construction wherein the court of appeals found that the agency's regulations were not on their face contrary to the CWA. In fact, given judicial deference to the views of the agency charged with administering a statute,[3] this case would not be appropriate for certiorari even if the decision at issue were not interlocutory. This is because certiorari is ordinarily reserved for cases of statutory interpretation involving a judgment that is inconsistent with long-established agency policy. In *Morton v. Ruiz*, 415 U.S. 199, 201 (1974), for example, certiorari was granted "because of the significance of the issue *and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary and of the Bureau*" (emphasis added). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("Riverside Bayview") (certiorari granted because court adopted narrow view of Corps' jurisdiction in conflict with Corps' view); *Chemical Mfrs. Ass'n. v. National Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (certiorari granted when lower court decision challenging agency's statutory interpretation was in direct conflict with earlier decision of another circuit affirming the agency's view).

II

THE DECISION BELOW IS CORRECT; CONGRESS INTENDED THAT CLEAN WATER ACT JURISDICTION REACH AS FAR AS PERMITTED UNDER THE COMMERCE CLAUSE

A. The Ninth Circuit's Decision Is Not Nearly As Broad As Petitioner Claims

Petitioner asserts that the question presented to this Court is "[w]hether the Clean Water Act reaches temporarily wet areas whose 'waters' (a few inches of rainwater ponding only days or

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[3] "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

weeks during the winter season) are neither navigable nor adjacent to, or connected with, any navigable waterbody, and whose claimed link with interstate commerce is solely the presence of migratory birds or endangered species." Petitioner implies that the Ninth Circuit's decision establishes CWA jurisdiction over the many acres of the property which are subject to "ephemeral ponding," which petitioner describes as where there is "standing rainwater a few inches deep in the bottom of the furrows of a plowed field for no more than a few hours at a time." Pet. at 9.

The decision below does no such thing. The only part of the property over which the Ninth Circuit found Corps jurisdiction was the southern portions of Parcels 143 and 10, which are subject to regular tidal inundation by Bay waters. As to the remainder of the property, the appellate court's decision was carefully limited. Declining to find CWA jurisdiction over any of the crystallizers or calcium chloride ponds, the court remanded the case to the district court to determine whether there was any CWA jurisdiction over these portions of the property.

The Ninth Circuit did not hold that "ephemeral ponding" renders a site a "water," nor did it express any opinion as to exactly how wet a site must be to qualify as a "water." It held only that "the seasonal nature of the ponding is no obstacle to Corps jurisdiction," and that the fact that the site was artificially created also does not bar jurisdiction. OPIN at A-9-11. In other words, the court held that sites that are dry during a particular season or part of a season may under appropriate circumstances be subject to CWA jurisdiction. Exactly which circumstances render a site sufficiently aquatic, and which parts of the crystallizers and calcium chloride pits are considered "waters," remains to be determined by the trial court.

Nor does this case present a situation of waters that are totally isolated from navigable waters, their nonnavigable tributaries, or their adjacent wetlands, as petitioner would have it. The property at issue in this case is, by any estimation, an integral part of the San Francisco Bay estuary and wetlands system. The property is adjacent to both the navigable Newark Slough and the San Francisco Bay National Wildlife Refuge, connected to both by

culverts through which tidal waters flow.[4] Parts of the property have been found by the Ninth Circuit to be adjacent wetlands and that determination is now final. The endangered salt marsh harvest mouse, which inhabits only the salt marshes surrounding the San Francisco Bay, lives on the property.

The property, as part of the San Francisco Bay wetlands system, is on the Pacific flyway, "a chain of wetlands" stretching from the Arctic to South America which serves as the principal bird migration route along the west coast of the Americas. *See* Steinhart, *Tracks in the Sky: Wildlife and Wetlands of the Pacific Flyway* (1987) at 28. Wetlands around the San Francisco Bay are a particularly important part of the Pacific flyway:

> San Francisco Bay is the largest wintering and staging area along the coast. More than 70% of the shorebirds using the flyway stage or winter or breed there. "It's the major refueling and resting place for birds on the Pacific flyway," says Roger Johnson, manager of the San Francisco Bay National Wildlife Refuge. "There's no other place of any greater significance on the Pacific coast."

Id. at 30-31; *see* RT 1294. Estimates are that over 90% of San Francisco Bay's original wetlands have been lost to fill or development. *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environmental and Public Works*, S. Hearing No. 99-278, 99th Cong., 1st Sess. 292 (1985) ("1985 Oversight Hearings").

In short, this case does not, as petitioner asserts, present the question whether CWA jurisdiction extends to ephemerally ponded areas that are totally isolated from navigable waters, their

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[4] Although the district court made no findings on the issue, evidence was presented indicating some hydrological connection between the waters on the crystallizers and calcium chloride ponds, and the tidal waters on the southern portions of the property. Government hydrologist Robert Coats observed tidal water on the crystallizers "on several occasions," and noted that "[d]uring intense and prolonged rainfall, water overflows from the depressions [on the crystallizers] and drains to Newark Slough." RT 1128; Exh. 535 at 2.

tributaries, and their adjacent wetlands. Indeed, the issue cannot yet be framed in a meaningful factual context because the district court has yet to determine how much, if any, of the crystallizers and calcium chloride ponds fall within CWA "other waters" jurisdiction.

B. The Purposes of the Clean Water Act Include Wildlife Protection and Wetlands Preservation

Petitioner asserts that the purpose of the CWA is "to attempt to restore the purity of the national waters, not to protect interstate wildfowl or endangered species." Pet. at 11. Petitioner is wrong. As the Act itself states, its objective is to restore and maintain not just the chemical and physical integrity of the nation's waters, but also their "biological integrity." 33 U.S.C. § 1251(a). The goal set forth in the Act is to achieve a water quality "which provides for the protection and propagation of fish, shellfish, and wildlife. . . . " 33 U.S.C. § 1251(a)(2). This central purpose is echoed throughout the Act. *See e.g.*, 33 U.S.C. §§ 1312(a), 1313(d)(1)(B), 1321(b) and (d), 1326(a), 1330(a), (b) and (k), 1343(c)(1)(A), and 1344(c).

Because wetlands provide vital habitat for a wide array of wildlife, particularly a disproportionate number of endangered species, wetlands preservation and wildlife protection go hand in hand. Over half of the fish and amphibian species listed as threatened or endangered, as well as 31% of threatened or endangered birds and reptiles and 15% of mammals, are associated with wetlands. Mitsch & Gosselink, *Wetlands* (1986) at 398-99. Moreover, wetlands serve a number of other ecosystem purposes, such as flood mitigation and aquifer recharge, which affect hydrological cycles regardless whether the wetland is "isolated" or not.

The legislative history of the CWA confirms that wetlands protection is an important purpose of the Act. As Senator Muskie stated during the debate on the 1977 amendments:

> There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage . . . . The wetlands and bays, the estuaries and deltas are the Nation's most biologically active areas . . . . They are

> a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

123 Cong. Rec. 26720 (Aug. 4, 1977). And, as this Court noted in *Riverside Bayview*, the inclusion in the 1977 amendments of a provision authorizing a $6 million appropriation to complete a "National Wetlands Inventory" "reflects congressional recognition that wetlands are a concern of the Clean Water Act . . . ." 474 U.S. at 139. In addition, during the 1985 Senate Oversight Hearings on Section 404, when an Army Corps official asserted, as petitioner does herein, that the CWA was not a wetlands protection law, the senators responded vehemently, affirming that to the contrary the congressional intent *was* to protect wetlands.[5] In fact, the senators emphasized that the intent was to protect all wetlands, including so-called "isolated" wetlands that were not connected to navigable waters or their tributaries. *1985 Oversight Hearings* at 113-116, 121, 172.

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[5] Senator Stafford stated:

> it was the intent of the Congress that wetlands are important and are to be protected under section 404 of the Clean Water Act. For an agency as important to this task as the civilian arm of the Army Corps of Engineers to hold otherwise is to frustrate the very goals of the act.

1985 Oversight Hearings, at 102.

Senator Mitchell also emphasized these purposes of the CWA:

> [Section 404] of the Act was intended by Congress to be one of the most important regulatory tools to stem the loss of wetlands. Unfortunately, it has not done so.
>
> Few Americans would disagree that wetlands are of national importance. Waterfowl and other water birds are dependent on wetlands throughout their life cycles, as are many fur-bearing animals. It is estimated nearly two-thirds of the fish caught by American commercial fishermen are dependent on estuarine areas and associated wetlands. These areas also buffer the effects of storms, purify water, aid in ground water recharge, and provide substantial flood control.

Id. at 105. *See also* remarks of Senator Chafee, *Id.* at 96.

C. Congress Intended To Assert Clean Water Act Jurisdiction Over All Waters Whose Degradation Could Affect Interstate Commerce

Petitioner's argument that the Ninth Circuit's decision is legally erroneous is built upon a flimsy cardhouse of unsupportable claims. Most fundamental among these is petitioner's assertion, without any support in the language or the legislative history of the CWA, that in the CWA "[f]rom first to last, the [congressional] preoccupation was with navigability." Pet. at 15. As respondents will demonstrate however, Congress did not wish jurisdiction under the CWA to be restricted on the basis of any reference to navigability.

Petitioner is also wrong that asserting CWA jurisdiction to the full extent permitted by the Commerce Clause was a brand new expansion of jurisdiction instituted by the Army Corps and EPA for the first time in 1985, without the knowledge or support of Congress. A review of the pertinent legislative history and regulations demonstrates that the federal agencies had since 1975, in response to court decisions and the urging of Congress, asserted jurisdiction over all waters the use, degradation or destruction of which could affect interstate commerce. Such waters, not surprisingly, include waters that provide habitat for migratory birds and endangered species.

Indeed, the history of CWA enforcement shows that the Corps never overstepped its congressional mandate; to the contrary, the Corps consistently was reluctant to assert its jurisdiction to the full extent intended by Congress, only doing so when Congress and the courts took it to task for its failure to effectuate the congressional intent. The explicit reference to migratory birds and endangered species was inserted in the preamble to the 1986 Corps regulations not because the Corps wanted to expand its jurisdiction but rather in direct response to adamant pressure from senators who expressed concern during the 1985 oversight hearings that the Corps was not enforcing the CWA broadly enough.

1. The 1972 Clean Water Act, The *Callaway* Decision, And The 1975 Interim Final Regulations

Congress formulated a broad definition of "navigable waters" to facilitate accomplishment of the CWA's far-sighted objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The final version of the CWA, unlike the original House and Senate versions, eschewed references to navigability in establishing the jurisdictional sweep of the Act, instead defining "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). *See* S. 2770, 92nd Cong., 1st Sess. § 502(h); H.R. 11896, 92nd Cong., 2d Sess. § 502(8). As this Court noted in *Riverside Bayview*, 474 U.S. at 133, the legislative history of the 1972 Act "makes it clear that the term 'navigable' as used in the Act is of limited import."

The Conference Report on the bill explained the omission of the word "navigable" from the definition of navigable waters as follows:

> The conferees fully intend that the term "navigable waters" be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes.

S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); *see* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972). In presenting the Conference version of the Act to the full House, Congressman Dingell further explained that, for purposes of the Act, navigable waters

> means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in the laws .... The authority of Congress over navigable waters is based on the [commerce clause] .... No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.

118 Cong. Rec. 33756-57 (1972).

Courts have consistently interpreted the scope of CWA jurisdiction in the broadest constitutional manner. In 1975, the District Court for the District of Columbia invalidated the Army Corps CWA regulations then in effect on the grounds that they unlawfully restricted CWA jurisdiction by reference to navigability. *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975). In *Callaway*, the court held that in enacting the CWA, Congress

> asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.

Id.

In response to *Callaway*, the Corps published interim final regulations in 1975 which greatly broadened the scope of its regulatory activities under the CWA. 40 Fed. Reg. 31320 (1975); 33 C.F.R. § 209.120(d)(2). Those regulations included in the definition of "waters," inter alia, intrastate waters used for activities involving interstate commerce and

> [t]hose other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of *intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters* identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer.

40 Fed. Reg. at 31324-25 (emphasis added). While the 1975 regulation listed certain of the intrastate waters whose condition affected interstate commerce (40 Fed. Reg. at 31324), the preamble to these regulations was careful to state that:

> *this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category.* The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over "other waters", such as intermittent rivers, streams, tributaries and perched wet-

> lands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.

42 Fed. Reg. 37122 at 37128 (1977) (emphasis added).

Thus, the 1975 interim regulations responded to the *Callaway* decision by acknowledging that the CWA could extend to all waters whose condition could affect interstate commerce. The regulations did not attempt to spell out every conceivable type of water whose condition could affect interstate commerce. Rather, they listed a few of the obvious categories of such waters and gave wide discretion to the District Engineer to assert jurisdiction over any other waters with some connection to interstate commerce. In sum, the only waters apparently excluded from jurisdiction under these regulations were other waters which were not adjacent to navigable waters and which were not related at all to interstate commerce.

2. Post-*Callaway* Congressional Consideration Of The Corps Regulations And The Extent Of Jurisdiction Under The Clean Water Act

The Congressional debate leading up to the 1977 amendments to the CWA focused on perceived problems relating to the expanded jurisdiction set forth in the 1975 Corps interim final regulations.[6] In particular, although the Corps proposed to require

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[6] *See* Testimony of Senator Dole, *Hearings Before the Senate Committee on Public Works on Section 404 of the Federal Water Pollution Control Act Amendments of 1972*, 94th Cong., 2d Sess. (1976), p. 34-36 (noting broad sweep of Corp's regulatory jurisdiction after *Callaway* encompasses "most waters in the United States"); Testimony of Senator Domenici, *Id.* at 156 (*Callaway* interprets Section 404 to apply to "all waters"); Statement of Senator Bentsen, *Id.* at 561-62 (under *Callaway*, Corps will exercise jurisdiction "on nearly every body of water in this country"); Statement of Senator Hansen, *Id.* at 563 (pursuant to Section 404, Corps "has jurisdiction over almost all waters of the United States"); Letter submitted by Senators Hart, Moss, and Weicker, *Id.* at 564 (regulatory authority under Section 404 is "broad" and includes

section 404 permits under all circumstances, Congress was united in determining that amendments to the Act should ensure that normal farming, ranching, and forestry activities should be exempted from section 404 permitting requirements. Absent amendments to the CWA, these activities would have been subject to permitting requirements as a result of the expanded Corps jurisdiction embodied in the new regulations.

Two different solutions to this problem were proposed. The Senate Committee on Environment and Public Works proposed amendments which retained the broad scope of jurisdiction specified in *Callaway* and the new regulations, but exempted normal ranching, agricultural activities, and silvicultural practices from permitting requirements. *See* S. Rep. No. 370, 95th Cong., 1st Sess. 10-11 (1977). The Senate Committee Report makes abundantly clear the Committee's intent to leave undisturbed those provisions in the Act extending jurisdiction as far as the constitution allows:

> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest possible constitutional extent .... Restriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve .... The committee amendment does not redefine navigable waters.

Id. at 75.[7]

"marshes, potholes, and other waterfowl nesting areas"); Statement of Senator Long, *Id.* at 565 (after *Callaway*, Corps has extended its regulatory program over "almost everything that is wet," including "lakes over five acres in area even if they are completely landlocked and privately owned"); Statement of Senator McClellan, *Id.* at 578 (after *Callaway*, Corps has expanded its regulatory program to include "all waters of the United States"); Statement of Senator McGee, *Id.* at 579 (*Callaway* effects an "extremely broad definition of 'navigable waters'" which includes "practically every body of water").

[7] The Committee bill received broad support on the floor of the Senate. Senator Hart spoke of the importance of maintaining the Clean Water Act's protection of "all of the elements of [water] systems," including "small streams, marshes, wetlands, and swamps." 123 Cong.

A minority in the Senate proposed a different solution to the problem. This minority rallied around a substitute to the Committee bill proposed by Senator Bentsen which would have greatly narrowed the scope of Corps jurisdiction under the Act by redefining navigable waters to mean only traditionally navigable waters and adjacent wetlands. A long debate over the Bentsen substitute ensued, during which the membership of the Senate displayed an intimate familiarity with the 1972 enactment, the *Callaway* decision, and the Corps' 1975 interim final regulations which defined navigable waters as broadly as the constitution would allow. 123 Cong.Rec. 26710-28.[8]

Rec. 26713 (August 4, 1977). Senator Stafford spoke of the "comprehensive jurisdiction over the Nation's waters to control pollution" which was effected by the 1972 enactment, and stated that "[a]fter extensive deliberation, the committee amendment rejects the redefinition of navigable waters." 123 Cong Rec. 26714. Senator Chafee rose to warn of the dangers inherent in any attempt to narrow the scope of the Corps' regulatory jurisdiction under Section 404. 123 Cong.Rec. 26716. Senator Baker stated that "[a] fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes" and asserted that "[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition." 123 Cong. Rec. 26718.

[8] As with the 1976 Oversight Hearings, the comments of numerous senators indicate their understanding that absent an amendment reducing the scope of Corps jurisdiction under the Act, the Act's jurisdiction would apply to all waters whose use or condition affects interstate commerce. *See* Statement of Senator Bentsen (under the Committee's amendment "[t]he [section 404] program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies"; the thrust of the Bentsen amendment is "dramatically cutting the size. . .of the present program"), 123 Cong. Rec. 26711-12; Statement of Senator Hart ("if [the Bentsen] amendment is adopted it will remove 98 percent of all the rivers, streams, and lakes from the protection program which the Congress has adopted. It will remove 85 percent of the wetland areas of this country from this kind of necessary national and Federal protection."), 123 Cong. Rec. 26713; Statement of Senator Muskie (speaking in support of the Committee proposal) ("we have to care about these marshes above the high water mark and about our inland marshes. It is also important for

Ultimately the Bentsen substitute was defeated. 123 Cong.Rec. 26728. Thus, the Senate expressly rebuffed an attempt to limit the scope of waters which were subject to the Corps' regulatory authority under the CWA. The fact that the Senate spurned the proposed narrowing amendment to the CWA with full knowledge of the judicial decisions construing the Act and of the manner in which the Act was being implemented by the Corps is particularly significant. See *Riverside Bayview*, 474 U.S. at 137-38.

After the House and Senate passed their respective bills to amend the CWA, a Conference Committee was convened. The conferees decided to retain the comprehensive jurisdictional sweep of the CWA and to repudiate the narrowing of Section 404 jurisdiction which had been rejected earlier in the Senate but had passed in the House. *See* H.R. 3199, 95th Cong, 1st Sess. 16 (1977).

In presenting the Act which emerged from conference to the full Senate, Senator Muskie proudly stated that "[t]he conference bill follows the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any of the Nation's waters." 123 Cong. Rec. 39187 (December 17, 1977). Likewise, Senator Baker reiterated that "the conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional extent." 123 Cong. Rec. 39209. The Act, as reported by the Conference Committee, sailed through both the House and the Senate with near unanimous votes.

The language of the 1977 CWA amendments confirms that Congress understood that CWA jurisdiction reached to isolated

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those who are sportsmen to remember that *these wetlands provide the breeding and feeding areas for our migratory waterfowl and for furbearing mammals* and the spawning grounds and nursery areas for fish. *We must care about what happens to inland wetlands"),* 123 Cong. Rec. 26716 (emphasis added); Statement of Senator Tower ("If the current definition of navigable water is allowed to stand, it will mean that many day-to-day activities on lands that are wet, swampy, or poorly drained will require a permit"), 123 Cong. Rec. 26722.

waters whose condition affected interstate commerce. The amendments expressly omitted construction and maintenance of stock ponds and irrigation ditches, and maintenance of drainage ditches from coverage under section 404. *See* 33 U.S.C. § 1344(f)(1)(C). If petitioner were correct in its assertion that Congress intended that jurisdiction only reach to navigable waters, their tributaries, and adjacent wetlands, then such an exemption would have been unnecessary. Under petitioner's interpretation, it also would have been unnecessary for Congress to exempt normal agricultural, silvicultural, and ranching activities from section 404 permitting requirements, as these activities would not typically fall within the narrowed scope of jurisdiction proposed by petitioner.

Thus, both the congressional debate over the 1977 amendments and the language of the amendments clearly demonstrate that Congress intended to confirm the approach taken by the courts (evidenced by the *Callaway* opinion) and by the Corps in applying CWA jurisdiction as broadly as permitted under the commerce clause.

3. Subsequent Corps Regulations

The Corps' 1975 interim final regulations were superceded by final regulations effective July 19, 1977. The Senate debate over the pertinent provisions of the 1977 CWA amendments occurred shortly after these regulations went into effect, and at least some senators were aware of these regulations. *See* 123 Cong. Rec. 26718 (1977) (statement of Senator Baker). The preamble to these regulations states:

> We have interpreted the guidance contained in this legislative history to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce as interpreted by the Supreme Court on several occasions.

42 Fed. Reg. 37127 (citations omitted). In addition to navigable waters, tributaries to navigable waters, interstate waters, and adjacent wetlands, the 1977 Corps regulations included the following category in its list of waters under CWA jurisdiction:

> (5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[9]

42 Fed. Reg. 37144 (1977). This regulation did not include any specific examples of other waters wherein the interstate commerce nexus was satisfied. The preamble notes that rather than substantively changing the definition of "navigable waters" set forth in the 1975 interim regulations, it merely "consolidated" the 1975 list of categories to "assist in clarifying those waters that are subject to the Section 404 program." 42 Fed. Reg. 37127.

With respect to their definition of "navigable waters," the 1977 regulations are virtually the same as the 1986 regulations which have governed the instant case.[10] Although the 1986 regulations contain some examples of other waters whose condition could

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[9] [This footnote is included in the regulation as fn.2.] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." . . . *Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious* or where the location or size of the waterbody generally may not require regulation, through individual or general permits to achieve the objective of the Act. . . . (emphasis added).

[10] The 1986 regulations define "waters of the United States," in pertinent part, as:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .

33 C.F.R. § 328.3(a)(3).

affect interstate commerce, both the preamble and the history of the regulations clarify that these examples are not intended to be all-inclusive.

4. 1985 Congressional Oversight Hearings

In 1985, a controversy developed over the Corps' regulation of wetlands, and particularly isolated wetlands, under section 404. Members of the Senate Environment and Public Works Committee conducted hearings to determine whether the Army Corps and EPA were exercising CWA jurisdiction as broadly as Congress intended, or whether, as the senators suspected, the Corps was "dragging its heels" on wetlands protection. *1985 Oversight Hearings* at 102. Senator Stafford described the problem as follows:

> [T]he EPA seems to be allowing the corps to exclude from section 404 coverage hundreds of thousands of acres of valuable swamps and bogs that are undeniably waters of the United States.

Id. In these hearings, the senators repeatedly confirmed that the CWA should be given the broadest possible interpretation consistent with the commerce clause. Senator Mitchell warned Robert Dawson, Acting Assistant Secretary of the Army, not to unduly restrict Corps CWA jurisdiction:

> I think there is a need for a clear national policy. And as you devise that policy, I strongly encourage you to look at the law expressly set forth by the court in the *Callaway* case, to which I referred earlier, and which I repeat. The court said that Congress, in enacting the 1972 law, had asserted Federal jurisdiction over the Nation's waters to the maximum extent permissible under the commerce clause of the Constitution.
>
> The act has been dealt with by Congress in the interim. Congress has not in that time sought in any way to repudiate or contravene or contradict that court's statement. So you may assume under well established principles of judicial construction that that is a correct statement of the intent of Congress, known to and acquiesced by Congress since then. And the national policy, which it seems to me you must

> enunciate, must by law incorporate that to the extent possible.

Id. at 128-29; *see also id.* at 95-6, 101-102, 113-115, 121-123, 172, 193, 207.

The senators evinced particular concern that the Corps was failing to enforce section 404 in connection with isolated wetlands. Over and over again, the senators emphasized that the CWA was intended to protect all wetlands, including isolated wetlands. *See, e.g., id.* at 95-6, 101-105, 113-116, 120-123, 194. Senator Mitchell stated:

> Any reading of the background of this must inevitably lead to the conclusion that you should ascertain and implement jurisdiction over isolated wetlands. . .

Id. at 172. In fact, it was at these hearings where senators questioned whether the Corps understood that use of isolated wetlands by migratory waterfowl would establish the requisite interstate commerce connection such that there was CWA jurisdiction. Senator Mitchell posed the issue to Corps official Dawson:

> Do you agree that isolated wetlands are within the corps' section 404 jurisdiction where they are used by migratory fowl, waterfowl, which establishes the interstate commerce basis for jurisdiction?

Id. at 115.

Subsequently, EPA submitted a written statement responding to the subcommittee's concerns regarding isolated wetlands. This statement for the first time spelled out in detail the federal agency's enforcement policies with respect to non-navigable isolated waters. "The simple answer" to the question of jurisdiction over these waters, stated EPA, "is that all such waters are regulated if their use, degradation or destruction would or could affect interstate or foreign commerce." *Id.* at 189. EPA continued:

> The more difficult issue is defining the criteria to be used in determining whether or not there is a connection to interstate or foreign commerce, and how such criteria would be applied

> to individual lakes, ponds and wetlands . . . It would be virtually impossible to delimit all possible combinations of circumstances which would affect interstate or foreign commerce. We fear that in trying to do so we might overlook some possibilities and inadvertently narrow jurisdiction. Since the legislative history of the Clean Water Act makes clear that Congress intended to extend its jurisdiction to the maximum extent permissible under the Commerce Clause of the Constitution, I am sure you share our concern with this possible outcome.

Id. at 189. With that proviso, EPA went on to list circumstances which provided the necessary interstate commerce nexus, emphasizing that the list was not "all inclusive." The list included the following:

- waters used as habitat by birds protected by Migratory Bird Treaties. This represents a national interest of very nearly the first magnitude, as it can be protected only by national action in concert with that of another nation.

- waters used as habitat by other migratory birds which cross state lines

- waters which are habitat for endangered species, to preserve the possibility of interstate movement of persons, such as scientists, who come to a state to observe and study these species

Id. at 189-90.

Senator Mitchell expressed concern that this definition excluded waters which *could be* used as habitat for migratory birds or endangered species. *Id.* at 169-71. No one—neither the senators nor the Corps nor EPA—questioned that use of waters by migratory birds or endangered species established the requisite interstate commerce connection. The debate centered only on whether *potential* use established enough of a connection. A subsequent EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters was prepared describing the agency's position as consistent with that of Senator Mitchell. *See* Exh. 575. That memorandum was forwarded by the Corps to its field offices

with a cover memorandum stating that the memo "is consistent with our regulations at 33 C.F.R. 323.2(a)(3)." Exh. 575 at 2.

D. The Ninth Circuit's Decision In This Case Is Consistent With Pertinent Case Law

Notably absent from the petition in this case is any assertion that the Ninth Circuit decision is inconsistent with any court decisions either of this Court or of other circuit courts. Indeed, the Ninth Circuit decision herein is fully in line with a long line of case law interpreting the CWA. Federal courts have unanimously held that the scope of Corps' regulatory jurisdiction under section 404 of the CWA extends as far as the commerce clause constitutionally permits.[11]

This Court's decision in *Riverside Bayview* is most instructive as that case is very similar to the case at hand. In *Riverside Bayview*, a unanimous Court found that it was permissible under the CWA for the Corps to assert jurisdiction over freshwater wetlands that were adjacent to navigable waters, but whose moisture did not come from those adjacent waters. The Court noted that jurisdiction over such wetlands is reasonable even where there are such adjacent wetlands that are of no great importance to the adjacent aquatic environment, because as a general proposition it was reasonable for the Corps to conclude

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[11] *See, e.g., United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983), *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983), *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979), *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978), *People of the State of California ex rel. State Water Resources Control Bd. v. E.P.A.*, 511 F.2d 963, 964 n. 1 (9th Cir. 1975), *rev'd on other grounds sub nom. E.P.A. v. State Water Resources Control Bd.*, 426 U.S. 200 (1976), *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974), *United States v. Ciampitti*, 583 F.Supp. 483, 491 (D.N.J. 1984), *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F.Supp. 278, 285-86 (W.D.La. 1981), *aff'd in part and rev'd in part on other grounds*, 715 F.2d 897 (5th Cir. 1983), *Sun Enterprises, Ltd. v. Train*, 394 F.Supp. 211, 223-224 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2nd Cir. 1976), *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975), *United States v. Holland*, 373 F.Supp. 665, 671-73 (M.D.Fla. 1974).

that all adjacent wetlands may function as integral parts of the aquatic environment, regardless of the source of their moisture. 474 U.S. at 135, n.9. The Court pointed out that if a wetland is not important to the aquatic environment, the Corps can always simply issue the requested permit. *Id.*

The Court also considered carefully the 1977 congressional debate over the CWA amendments. The Court found it highly significant that although the scope of asserted Corps wetlands jurisdiction was specifically brought to Congress' attention, Congress rejected measures proposed to limit Corps jurisdiction:

> Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.

474 U.S. at 137 (citations omitted).

The Court's reasoning in *Riverside Bayview* applies precisely to this case. As the discussion in section II(C), supra, demonstrates, Congress was well aware that both courts and the Corps had interpreted CWA jurisdiction as extending to the maximum extent permissible under the commerce clause. Indeed, it was this broad assertion of jurisdiction over wetlands and isolated waters that had prompted such vigorous debate over whether to reduce the scope of jurisdiction. In the end, however, Congress deliberately chose to retain the broad scope of jurisdiction, rejecting outright the proposed amendment that would have eliminated aquatic areas such as those at issue in this case from a definition of "waters of the United States."

Petitioner's assertion that the Ninth Circuit "ignored" the Fourth Circuit's unpublished ruling in *Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (Table), "thereby creating a square conflict," is wrong. The Ninth Circuit did not "ignore" *Tabb Lakes*, and no conflict among the circuits was created.

In *Tabb Lakes*, the court set aside the Corps' finding of jurisdiction in a particular case because the Corps had improperly relied upon an internal 1985 Corps memorandum in making its jurisdictional determination. The court explicitly did not reach the question whether the Corps may, consistent with the CWA, assert jurisdiction over waters which provide habitat for migratory birds or endangered species.[12] 715 F.Supp. at 729. The Ninth Circuit did not discuss *Tabb Lakes* because petitioner never made the argument made in that case—that the Corps followed improper procedures in asserting "other waters" jurisdiction over parts of the Leslie property.

III. THE NINTH CIRCUIT DECISION DOES NOT, AS PETITIONER CLAIMS, PROHIBIT DEVELOPMENT ON VAST AMOUNTS OF LAND

Petitioner goes so far as to assert that the Ninth Circuit's decision accomplishes "a radical transformation of private property into public land," potentially withdrawing tens of millions of acres[13] of land from development. Pet. at 8, 9. Petitioner's theory is apparently based on its unwarranted presumption that its own chance for getting a section 404 permit from the Corps is "virtually nil." Pet. at 10.

This alarmist theory has no basis whatsoever. Petitioner's suggestion that takings may in the future occur is mere speculation, and in any event offers no support for a narrow reading of the CWA. Petitioner's argument was firmly rejected by the Court in *Riverside Bayview:*

> [T]he possibility that the application of a regulatory program may in some instances result in the taking of individual

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[12] The "grave doubts" expressed by the district court in *Tabb Lakes* were voiced with respect to whether providing habitat for migratory birds establishes a sufficient nexus to interstate commerce, *not* whether Congress intended CWA jurisdiction to extend as far as permitted under the commerce clause. 715 F.Supp. at 729.

[13] The U.S. Fish and Wildlife Service estimates the number of "isolated" wetlands at 13 million acres, not "tens of millions of acres." *1985 Oversight Hearings* at 121, 194.

> pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty [citation omitted]; it merely frustrates permissible applications of a statute or regulation.

474 U.S. at 128. *See also Hodel v. Virginia Surface Mining & Reclamation Assn.* 452 U.S. 264, 293-297 (1981).

Furthermore, there is no reason to presume that development will be stopped on property within Corps jurisdiction. The Corps grants most permit applications, including applications for non-water-dependent projects. In Fiscal Year 1984, for example, the Corps issued 5,859 individual permits and denied 346 (one out of eighteen). *1985 Oversight Hearings* at 66 (testimony of Robert Dawson, Acting Assistant Secretary of the Army).[14] Of the permits issued that year, approximately 1,200 were for non-waterdependent projects. *Id.* at 67. There is simply no basis for likening CWA jurisdiction to a denial of all development rights and an unconstitutional taking of private property.

Nor is petitioner correct in claiming that the Ninth Circuit decision will create additional problems in drawing the line between land and water. That problem has always existed. *See Riverside Bayview,* 474 U.S. at 132. Regardless of where on the spectrum from oceans to totally dry land you draw the line separating water from land, there will always be some potential fuzziness around that line. *See* Mitsch & Gosselink, *Wetlands* (1986) at 16. If, for example, the courts or Congress were to endorse petitioner's proposal that CWA jurisdiction extend only to navigable waters, their tributaries and adjacent wetlands, then one still must determine which waters are "navigable," what exactly constitutes a "tributary" and what is a wetland adjacent to

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[14] The statistics are similar for other years:

FY 1983: 6,760 permits issued, 373 denied;
FY 1982: 8,864 permits issued, 324 denied;
FY 1981: 8,350 permits issued, 291 denied.

Id.

such waters and tributaries. These questions are no easier than those posed by the current definition, which includes all waters the use, degradation or destruction of which could affect interstate commerce.

CONCLUSION

For the reasons stated herein, the Court should deny Leslie's petition for certiorari.

DATED: January 22, 1991

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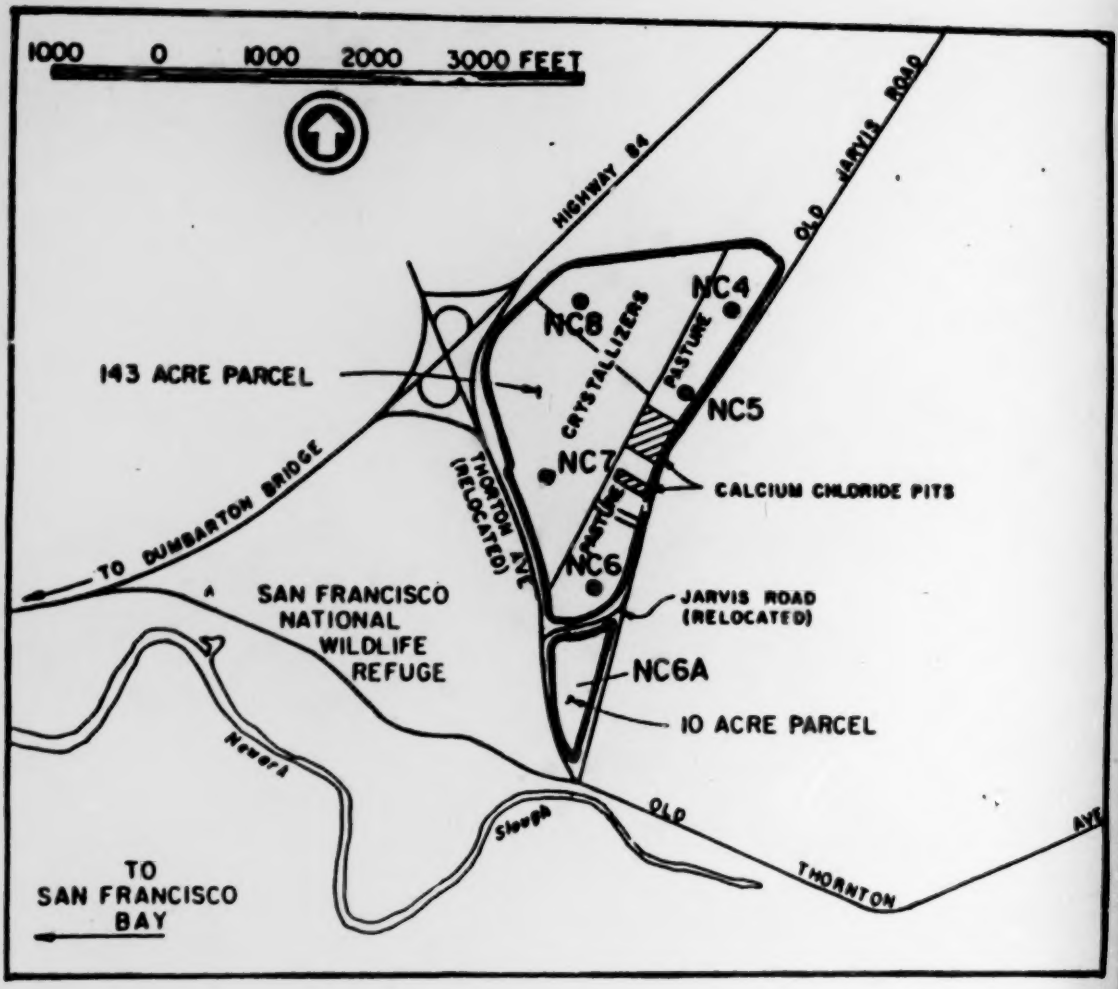
Appendix A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NC8
NC4
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PASTURE
143 ACRE PARCEL
NC5
NC7
CALCIUM CHLORIDE PITS
THORNTON AVE (RELOCATED)
PASTURE
TO DUMBARTON BRIDGE
NC6
SAN FRANCISCO NATIONAL WILDLIFE REFUGE
JARVIS ROAD (RELOCATED)
NC6A
10 ACRE PARCEL
Newark
Slough
OLD THORNTON AVE
TO SAN FRANCISCO BAY

(8)

No. 90-792

Supreme Court, U.S.
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JAN 22 1991
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. AND CARGILL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether seasonal bodies of water that are not hydrologically connected with navigable waters, but which serve as habitat for migratory birds or endangered species, are "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and therefore subject to federal regulatory jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-792

LESLIE SALT CO. AND CARGILL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 896 F.2d 354. The opinion of the district court (Pet. App. A15-A41) is reported at 700 F. Supp. 476.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1990. A petition for rehearing was denied on August 27, 1990. Pet. App. A42-A43. The petition for a writ of certiorari was filed on November 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (CWA) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. 1251(a). One of the chief goals of the Act is the attainment of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 101(a)(2), 33 U.S.C. 1251(a)(2). Under Sections 301 and 502 of the Act, 33 U.S.C. 1311 and 1362, the discharge of dredged or fill materials into "navigable waters" —defined as the "waters of the United States"—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to Section 404, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

The Corps of Engineers first published regulations further defining "navigable waters" for purposes of the Section 404 permit program on April 3, 1974. 39 Fed. Reg. 12,115 (1974). Those regulations limited the Corps' assertion of jurisdiction under Section 404 to "waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974). The Corps' initial interpretation of the scope of its jurisdiction under Section 404 met with substantial opposition. The Environmental Protection Agency (EPA) interpreted the CWA as a congressional assertion of significantly broader federal jurisdiction than would be encompassed by the traditional definition of "navigable waters." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works,*

94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers).[1] As the Corps later explained, its initial regulations raised concerns about the lack of protection for "isolated wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates." 42 Fed. Reg. 37,123-37,124 (1977). Several federal courts considering the coverage of adjacent wetlands agreed that the Corps had given Section 404 a more restrictive reading than was intended by Congress. See, *e.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974).[2] In *NRDC, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that Congress, in the CWA, "asserted fed-

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[1] EPA administers the CWA except as otherwise explicitly provided. § 101(d), 33 U.S.C. 1251(d). The Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). EPA has consistently supported a broad interpretation of the scope of CWA jurisdiction. Shortly after the Act was passed in 1972, EPA established a policy of preserving wetland ecosystems in the administration of its regulatory activities and grant programs. 38 Fed. Reg. 10,834 (1973). The agency took this action because "[t]he Nation's wetlands * * * are a unique, valuable, irreplaceable water resource," serving as "a habitat for important furbearing mammals, many species of fish, and waterfowl," and supporting "fishing, as well as wildfowl and other hunting." *Ibid.*

[2] Shortly after the *Holland* decision, the House Committee on Government Operations expressed the view that the Corps' narrow view of its jurisdiction under Section 404 did not comport with congressional intent. The Committee called upon the Corps to adopt the broader view taken by EPA and the court in *Holland*. H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974).

eral jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps of Engineers to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Ibid.*

In response to the order in *NRDC, Inc.* v. *Callaway*, the Corps of Engineers promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of "waters of the United States" to include, *inter alia*, waters that are not adjacent to navigable waters (sometimes referred to as "isolated waters"). 33 C.F.R. 209.120(d)(2)(*i*) (1976).[3] On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim final regulations to clarify many of the definitional terms. 42 Fed. Reg. 37,122 (1977). The final regulations were substantially similar to the 1975 interim regulations and

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[3] Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 Fed. Reg. 31,321, 31,324, 31,326 (1975). Phase II, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* Phase III, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations, including "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." 40 Fed. Reg. 31,325. See also 42 Fed. Reg. 37,124 (1977) (describing the three phases).

explicitly included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,144 (1977); see 33 C.F.R. 323.2(a)(5) (1978). The definition of "waters of the United States" promulgated in 1977 is substantially the same as the one in effect today. See 33 C.F.R. 328.3(a).[4]

2. a. Petitioner Leslie Salt Company (petitioner) owns approximately 153 acres south of San Francisco. The so-called Newark Coyote Property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. Pet. App. A2. The property was used for salt production prior to 1959. The eastern part of the property contains pits formerly used to collect calcium chloride. The western portion contains large, shallow, water-tight basins formerly used for crystallizing salt. Both the pits and the former crystallizers fill with water during the rainy season, which comes in the winter and spring months. *Id.* at A2, A13. This seasonal ponding lasts long enough in some areas to permit small fish to live. *Id.* at A2-A3. Migratory birds, including water and shore birds such as ducks, egrets, plovers, avocets, willets, sandpipers and dowagers, use the water-filled crystallizers and pits for feeding,

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[4] The Corps' current definition of "waters of the United States" was amended in 1982 to make it identical to EPA's definition of the same phrase in 40 C.F.R. 230.3. See 47 Fed. Reg. 31,795 (1982). The two agencies now define "waters of the United States," and hence the scope of federal regulatory jurisdiction, in the same way for all programs under the Clean Water Act.

roosting and resting. *Id.* at A3; E.R. 104, 106.[5] In addition, an endangered species, the salt marsh harvest mouse, uses the property as habitat. Pet. App. A3. The southern part of the property contains at least nine acres of wetlands that are hydrologically connected with the waters of Newark Slough and are subject to tidal inundation. Pet. App. A3, A8. These adjacent wetlands are no longer at issue.

b. In late 1985, the Corps of Engineers learned that petitioner had begun discharging fill in connection with the construction of ditches and a siltation pond on the property. The Corps accordingly issued a cease and desist order pursuant to its authority under Section 404 of the CWA. The Corps asserted jurisdiction over some 110 acres of the Newark Coyote property. Rather than apply for a permit, petitioner filed suit, challenging the Corps' assertion of jurisdiction; the United States brought an enforcement action against petitioner, which was consolidated with petitioner's declaratory judgment action. Pet. App. A3-A4.[6]

After a trial, the district court ruled that the Corps had no jurisdiction over any part of petitioner's property. With respect to the areas containing the crystallizers and pits, at issue here, the court first concluded that they do not fall within the defi-

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[5] "E.R." refers to the excerpts of record filed in the court of appeals.

[6] As this Court noted in *Riverside Bayview Homes*, 474 U.S. at 127, 135 n.9, the Corps' assertion of jurisdiction over an area does not necessarily preclude development. The landowner must, however, apply for a permit, 33 C.F.R. Pt. 323, or show why his proposed development fits within one of the regional or nationwide general permits created by the Corps' regulations as a way of allowing certain activities to occur with little delay or paperwork. 33 C.F.R. Pt. 330.

nition of "wetlands" found in the Corps' regulations, 33 C.F.R. 328.3(b), because they are not saturated with a frequency and for a duration sufficient to support a prevalence of wetland vegetation. Pet. App. A33-A40. The district court next ruled that the same areas do not qualify as "other waters" under Section 328.3(a)(3) of the Corps' regulations because they had been artificially created and are "dry most of the year." Pet. App. A32. The court found it unnecessary to reach the question, presented here, of the Corps' authority over waters based on their use by migratory birds. *Id.* at A31-A32. The district court also held that the southern portion of the property, though containing wetland vegetation, does not qualify as wetlands because the wetness there purportedly stemmed from governmental actions. *Id.* at A36-A37.

c. The United States appealed on all issues except whether the crystallizers and pits, in addition to being "other waters" under 33 C.F.R. 328.3(a)(3), qualify as wetlands under 33 C.F.R. 328.3(b). The court of appeals reversed and remanded. Pet. App. A1-A14. It unanimously concluded that the wetlands on the southern part of the property are within the Corps' jurisdiction under the CWA, Pet. App. A6-A8, A13, and petitioner does not challenge that holding here.

The court of appeals also ruled that the district court had erred in holding that the crystallizers and pits are excluded from the category of "other waters" covered by the regulations on the ground that they are of artificial origin and are dry for part of the year. *Id.* at A9-A11. In the court's view, the Commerce Clause, and thus the CWA, are "broad enough to extend the Corps' jurisdiction to local

waters which may provide habitat to migratory birds and endangered species." *Id.* at A12. The court pointed out, however, that the property must "still have sufficient connections to interstate commerce" to come within the Corps' jurisdiction as defined in 33 C.F.R. 328.3(a)(3), and it remanded for a determination on that issue. Pet. App. A11-A12.[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. See note 14, *infra*. Review by this Court is unwarranted for these reasons alone. But in addition, the decision below is interlocutory. The court of appeals merely rejected the district court's reasoning for excluding the waters at issue here from coverage under Section 404 and remanded the case to the district court for further proceedings to determine whether some or all of those waters fall within the Corps of Engineers' Section 404 jurisdiction, as described in the Corps' regulations. There accordingly has been no final determination by the courts below that the waters at issue are covered by Section 404. The proceedings on remand would considerably sharpen the issues by allowing for development of the evidence and findings

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[7] Judge Rymer dissented on this aspect of the case. She was of the view that the crystallizers and calcium chloride pits do not fall within the category of "other waters" within the meaning of the Corps' regulations because the record did not show that water flows directly or indirectly into another body of water. Pet. App. A13. She therefore found it unnecessary to reach the question whether the Corps has jurisdiction under the CWA over waters that are not adjacent to bodies of water. *Ibid.*

concerning the application of the Corps' regulations to land having the particular (and atypical) features involved here. The question petitioner seeks to present therefore is not ripe for review in the context of this case. Nor is it ripe for review from a broader perspective, since no other court of appeals has yet addressed the substantive question of the Corps' jurisdiction in circumstances such as these. The petition for a writ of certiorari therefore should be denied.

1. In *Riverside Bayview Homes*, the Court upheld the Corps' interpretation of the term "waters" to encompass wetlands adjacent to navigable waters and their tributaries, in light of "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." 474 U.S. at 133. In that case, the court of appeals had ruled that certain wetlands were not covered by the CWA because their aquatic characteristics were not the result of frequent flooding by navigable waters. See *id.* at 125. This Court disagreed, finding it "clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133.[8]

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[8] In reaching this conclusion, the Court cited (474 U.S. at 133) the Conference Report, which stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The Court also cited (474 U.S. at 133) the views of Representative Dingell, who, commenting on the conference bill, stated that the new and broader definition "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable

Petitioner resurrects the discredited navigability limitation in a slightly different guise. It contends (Pet. 16) that Congress meant to embrace only waters "that could be reached under its Commerce Clause *power to regulate water commerce*, i.e., navigable waters, actual and potential, together with their 'adjuncts,'" that is, wetlands adjacent to navigable waters. Petitioner reasons that the power to regulate water commerce, and hence the CWA, cannot extend to bodies of water that are "isolated" from navigable waterways.[9] But *Riverside Bayview Homes* makes clear that Congress in the CWA invoked much more than its power to regulate water commerce:

> Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."

474 U.S. at 132-133 (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 77 (1972)). Congress understood

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waters of the United States' in the technical sense as we sometime see in some laws." 118 Cong. Rec. 33,756-33,757 (1972).

[9] This category of waters is "isolated" from navigable waters only in the technical sense that there is no surface hydrological connection with such waters. Other important connections may nevertheless exist. For instance, "isolated" prairie potholes in the upper midwest play an important role in preventing flooding of navigable rivers. See note 16, *infra*. The "isolated" waters that are the focus of this case are located on a parcel that is partially subject to tidal inundation by San Francisco Bay. Pet. App. A3. Although the crystallizers and pits themselves may not be hydrologically connected with the Bay, they could reasonably be regarded as part of the same ecosystem.

that concepts of navigability have nothing to do with protecting aquatic ecosystems, and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" that is directly tied to the aquatic values that Congress sought to protect.

One of those aquatic values is the continuing ability of waters of the United States to "provide[] for the protection and propagation of fish, shellfish, and wildlife." § 101(a)(2), 33 U.S.C. 1251(a)(2). Petitioner's assertion (Pet. 11-12) that Congress was indifferent to wildlife when it enacted the CWA is flatly contradicted by this statutory language. Congress also mandated that the Corps consider wildlife in evaluating permit applications: Section 404(b) of the Act, 33 U.S.C. 1344(b), directs the Corps to evaluate permit applications under guidelines developed by EPA in conjunction with the Corps. Those guidelines must take into account, *inter alia*, the effect of discharges of dredged or fill material on fish, shellfish, and wildlife, as well as changes in aquatic ecosystem diversity, productivity, and stability. §§ 403(c)(1) and 404(b)(1), 33 U.S.C. 1343(c)(1) and 1344(b)(1).[10] In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and

[10] EPA has published the required guidelines at 40 C.F.R. Pt. 230. The guidelines recognize that "[t]he discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem." 40 C.F.R. 230.32(b).

breeding areas), wildlife, or recreational areas." § 404(c), 33 U.S.C. 1344(c). This Court recognized these significant goals of the CWA in *Riverside Bayview Homes* when it characterized the purpose of the Act as the "[p]rotection of aquatic ecosystems." 474 U.S. at 132.

Petitioner does not dispute that Congress's power under the Commerce Clause to control water pollution extends well beyond navigable waters. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).[11] Petitioner's argument that Congress in the CWA nevertheless declined to invoke its full powers under the Commerce Clause to restore the health of the Nation's waters is unsupported by statutory text or legislative history. For example, petitioner cites nothing to support its speculation (Pet. 14 & n.14) that Congress was concerned about the Fifth Amendment takings implications of invoking its full Commerce Clause powers in this setting. Petitioner's position also conflicts with

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[11] In *Virginia Surface Mining*, the Court cited *United States* v. *Byrd*, 609 F.2d 1204 (1979), with approval. The Seventh Circuit held in *Byrd* that the Corps' assertion of Section 404 jurisdiction over wetlands adjacent to an intrastate lake was a constitutional exercise of power (and was consistent with congressional intent), because "filling activities, although they are local, have the potential for exerting a substantial economic effect on interstate commerce by an easily traced chain of causation." 609 F.2d at 1210. The court recognized that the effect of such localized filling activities would be to degrade the water quality of the lake they adjoined, which would, in turn, affect interstate commerce through its impact on the lake's value for recreation, fish, and wildlife. *Ibid.* See also *Utah* v. *Marsh*, 740 F.2d 799, 803-804 (10th Cir. 1984). These cases confirm that Congress's goal in the CWA was protection of aquatic ecosystems, not protection of water commerce, and that Congress accordingly invoked its full powers to protect those ecosystems.

a host of cases concluding that Congress intended fully to exercise its Commerce Clause powers, unlimited by traditional concepts of navigability. See, *e.g.*, *United States* v. *Huebner*, 752 F.2d 1235, 1239, 1240-1241 & n.9 (7th Cir.), cert. denied, 474 U.S. 817 (1985); *Utah* v. *Marsh*, 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-916 (5th Cir. 1983); *United States* v. *Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374-375 (10th Cir. 1979); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 754-756 (9th Cir. 1978); cf. *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239, 243 (4th Cir. 1979).[12]

2. Whatever doubt might once have existed about the intended reach of the CWA over non-adjacent ("isolated") waters was laid to rest by the 1977 amendments to the Act. As this Court noted in *Riverside Bayview Homes*, 474 U.S. at 135, the Corps' broad assertion of authority over non-navigable waters in 1975 aroused some congressional opposition, which came to a head in 1977. As the Court recounted, critics of the Corps' program inserted a provision in the House bill that would have redefined "navigable waters" so as to limit the Corps' authority under Section 404 to waters navigable in fact and their adjacent wetlands that were periodically inundated by contiguous navigable waters. 474 U.S. at 136. The Senate bill did not redefine "navigable

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[12] Petitioner concedes (Pet. 11) that Congress was concerned with water purity in the CWA, but does not explain how that concern is consistent with petitioner's theory that Congress invoked only its power over water commerce and navigation.

waters," but "dealt with the perceived problem of overregulation by the Corps by exempting certain activities (primarily agricultural) from the permit requirement and by providing for assumption of some of the Corps' regulatory duties by federally approved state programs." *Ibid.* The 1977 Amendments, as ultimately enacted, followed the Senate approach. 474 U.S. at 137.

What is significant here is that Congress in 1977 fully realized that the Corps' regulations, particularly the Phase III portion of the program spelled out in 1975 (see note 3, *supra*), covered isolated waters. In the House, Representative Abdnor understood that under the regulations, "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes." 123 Cong. Rec. 34,852 (1977) (extension of remarks).[13] Representatives who favored retaining the broad definition of jurisdiction under Section 404 pointed to the importance of protecting all waters and wetlands. Representative Lehman expressed the view that Section 404, as interpreted in the Corps' regulations, "is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless esthetic and recreation benefits." *Id.* at 10,415. In support of continued coverage of "inland wetlands," Representative Steers inserted a statement by the Chairman of the Council on Environmental Quality, which pointed

[13] Representative Wright complained that the regulations' coverage of intrastate waters used by interstate travelers meant that "if one is going to visit his Uncle Fred out in North Dakota and fish in a pond on his land, then that property would be subject to a permit." 123 Cong. Rec. 10,431 (1977).

out that "[w]etlands, better known by such names as swamps, bogs, marshes, potholes, wet meadows and river outflow land," provide flood control, water purification, and "essential habitat in the life cycle of many birds and fish." *Id.* at 30,994-30,995.

The Senate bill, as noted above, did not attempt to restrict the Corps' broad assertion of jurisdiction. The Senate Report explained (S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977)):

> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.

This passage demonstrates the Committee's understanding of the Corps' phased-in expansion of Section 404 jurisdiction in the 1975 regulations, which included isolated waters in Phase III. See note 3, *supra*. Instead of rejecting that approach, the Committee incorporated the existing regulatory scheme into the amendment authorizing partial delegation of the Section 404 program to the States. § 404(g), 33 U.S.C. 1344(g).

The Senators clearly understood what was at stake. Senator Bentsen opposed the committee bill because it (123 Cong. Rec. 26,711 (1977))—

> skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies.

Senator Tower similarly objected to affirming the Corps' regulatory scheme, "which," he said, "covers not just the rivers of the Nation but all surface waters and wetlands of the United States." *Id.* at 26,722. On the other hand, Senator Stafford argued that it was unnecessary to narrow the definition of "waters" because the Senate bill "insures continued protection of the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the corps program in the so-called 'Phase I waters.'" *Id.* at 26,714.

As this Court observed in *Riverside Bayview Homes*, the Conference Committee adopted the Senate approach and "efforts to narrow the definition of 'waters' were abandoned." 474 U.S. at 137. Congress determined that the Corps would continue to have jurisdiction over Phase III isolated waters, although that authority could now be delegated to the States; in addition, exemptions for activities such as the construction of stock ponds and sedimentation basins were created. S. Conf. Rep. No. 830, 95th Cong., 1st Sess. 100-101 (1977). As Senator Baker explained (123 Cong. Rec. 39,209 (1977) (emphasis added)):

> [T]he conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional

> extent. A permit program will continue to regulate dredged or fill material discharged into *all* our Nation's waters.

In sum, Congress's refusal to overrule the Corps' construction of the CWA as extending to Phase III isolated waters shows the reasonableness of that construction, particularly because it was "brought to Congress' attention through legislation specifically designed to supplant it." *Riverside Bayview Homes*, 474 U.S. at 137 (citing *Bob Jones University* v. *United States*, 461 U.S. 574, 599-601 (1983), and *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979)).

3. In *Riverside Bayview Homes*, the Court found it appropriate to give deference to the interpretation by the Corps of Engineers and EPA that adjacent wetlands are covered by the CWA, "[i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 131, 134. Petitioner has not explained why deference is not equally appropriate with respect to the agencies' interpretation that non-adjacent ("isolated") waters, the destruction of which could affect interstate or foreign commerce (such as by eliminating the habitat of migratory birds), are also "waters of the United States" covered by the Act. As we have shown, Congress meant to invoke the full extent of its Commerce Clause powers to protect the Nation's waters for the benefit of humans and wildlife, and realized the importance of isolated waters in this endeavor. Hence, the agencies cannot be accused of extending jurisdiction beyond what Congress intended.

Petitioner contends (Pet. 18-20) that deference is unwarranted because what it terms the "novel no-

tion" of considering migratory-bird use as a sufficient nexus to interstate commerce was not "born" until oversight hearings before a Senate Subcommittee in 1985. In fact, the record of those hearings makes clear that the agencies had been basing jurisdiction over isolated waters on migratory-bird use (among other factors) all along.[14] At issue in 1985 was the *manner* in which the Corps had been exercising that jurisdiction—specifically, by requiring that there be evidence of actual (and in some cases extensive) use by migratory birds. *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 122-123 (1985) [hereinafter *Hearings*]. The Acting Assistant Secretary of the Army for Civil Works made clear that "the Corps of Engineers generally does accept the notion that migratory waterfowl [use] does constitute a nexus with interstate commerce." *Id.* at 168. The question was simply "the extent of use by migratory fowl." *Id.* at 115; see also *id.* at 123 (the question is "how many ducks"). The participants at the hearing recognized that the Corps had successfully asserted jurisdiction over an intrastate body of water in part on the basis of migratory-bird use in *Utah* v. *Marsh*, *supra*. *Hearings* 114, 121, 208. The Assistant Secretary assured the subcommittee that "[t]he Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations," and that a particularly controversial decision not to exercise jurisdiction over

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[14] The Commerce Clause power extends to the protection of migratory birds. *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979).

a pond in Texas was simply based on the fact that use by migratory birds in that instance was "trivial." *Id.* at 210-211; see also *id.* at 116. Hence, there is no merit to petitioner's contention that the agencies' interpretation with respect to migratory birds is of recent vintage.[15]

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[15] One development that did stem from the 1985 oversight hearings was a commitment by EPA and the Corps of Engineers to implement the regulations more fully by considering potential, as well as actual, use of isolated waters by migratory birds as a sufficient nexus to interstate commerce. *Id.* at 167-171. The Corps subsequently sent guidance to its field offices listing, *inter alia*, actual and potential usage by migratory birds as sufficient links to interstate commerce. In *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (table), the district court held that this guidance was procedurally defective because, in the court's view, it constituted a substantive rule that could not be promulgated without notice and opportunity for comment. The court expressly did not reach the question of the validity, as a substantive matter, of the Corps' assertion of jurisdiction in circumstances covered by the challenged guidance memorandum. 715 F.2d at 729. Although the United States disagreed with the district court's procedural ruling in *Tabb Lakes*, we did not seek review in this Court of the Fourth Circuit's unpublished affirmance of that ruling; instead the agencies have decided to institute rulemaking proceedings on the question of their jurisdiction over isolated waters. Pet. App. A48.

Contrary to petitioner's suggestion (Pet. 20-21), there is no conflict between *Tabb Lakes* and the decision below. Because petitioner has never challenged the procedural validity of the Corps' guidance regarding migratory birds, the courts below did not consider the issue decided in *Tabb Lakes*; conversely, as just noted, *Tabb Lakes* did not decide the question, at issue here, of the validity as a substantive matter of the Corps' assertion of jurisdiction over non-adjacent waters, based on the effect on migratory birds. Presumably for this reason, and because it did not mount a procedural challenge to

4. In this case, it remains to be determined on remand whether the non-adjacent waters at issue have a sufficient nexus to interstate commerce to support jurisdiction under the regulations of the Corps of Engineers and EPA. See Pet. App. A12 (remanding to "determine if the property has the requisite connections to interstate commerce"). For this reason, even if the validity of the regulation defining the Corps' jurisdiction to include isolated waters otherwise warranted review, it would be premature to consider that issue here, where the applicability of the challenged regulation has not yet been decided. The district court did not reach the question, posed by petitioner in this Court, of whether the regulations may properly reach isolated waters based on their use by migratory birds. The court of appeals majority addressed that question somewhat obliquely in a single sentence, *id.* at A12, and Judge Rymer, in dissent, found it unnecessary to reach the issue. *Id.* at A13. The remand to the district court (and possible further review by the court of appeals) would further illuminate the character of the waters and their use by migratory birds, and the proceedings on remand might also greatly clarify the interests at stake in this and similar cases and the precise application of the Corps' regulations in this setting. It also might moot this case. Hence, review of the legal issue that petitioner seeks to raise at this interlocutory stage of the case would be premature.

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the Corps' guidance regarding migratory birds, petitioner in fact does not urge review based on a supposed circuit conflict. Instead, while "noting" what it (erroneously) characterizes as a conflict of decisions on the procedural issue, petitioner explicitly "press[es]" only the "substantive" question of whether the CWA authorizes the Corps to regulate waters based on their use by migratory birds. See Pet. 7.

The legal issue likewise is not ripe for review from a broader perspective. No other court has rendered a definitive decision on the validity of the Corps' assertion of jurisdiction in circumstances such as these. See note 15, *supra*. Petitioner nonetheless asserts (Pet. 8) that review is warranted on account of the allegedly "far-reaching consequences" of the decision below. It is, of course, difficult to predict, prior to the proceedings on remand, what the precedential and other impact of the decision below might eventually be, since there has been no definitive ruling in this case that some or all of the waters in issue are covered by Section 404. It is safe to say, however, that petitioner's prediction (Pet. 8) that "tens of millions" of acres will be affected is quite wide of the mark. As petitioner has chosen to frame it (Pet. i, 7 n.9, 8), the question presented by this case involves isolated waters whose only link to interstate commerce is the presence of migratory birds or endangered species. Many isolated waters will have other links to interstate commerce. For instance, prairie potholes play a vital role in preventing flooding of navigable waterways.[16] They also attract hunters, birdwatchers and other interstate travelers.[17] Indeed, cases in which the only connection to inter-

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[16] See Hubbard & Linder, *Spring Runoff Retention in Prairie Pothole Wetlands*, 1986 J. Soil & Water Conservation 122; see also U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* 22-23, 43 (1984) ("drainage eliminates the flood storage value of pothole depressions, thereby increasing flooding problems as in the James River basin of North Dakota").

[17] Wetlands of the United States, *supra*, at 24-25 ("[i]n 1980, 5.3 million people spent $638 million on hunting waterfowl and other migratory birds").

state commerce is use by migratory birds have been rare, and this appears to be the only reported decision squarely to address the issue of whether the Corps has jurisdiction in such circumstances.

Petitioner's contention (Pet. 23) that the decision below will have "enormous consequences" likewise is unfounded. The only question here is whether the CWA authorizes the Corps to assert regulatory *jurisdiction* over isolated waters—and more particularly, whether it authorizes the Corps to assert jurisdiction based on use of the waters by migratory birds. Petitioner's challenge to the Corps' threshold jurisdiction even to consider the effect of particular fill projects on such waters would, if accepted, pretermit the permit review process that Congress prescribed to ensure that waters are not destroyed without a prior assessment of the ecological importance of the particular waters and the impacts of the proposed activity on them. Where waters covered by the Corps' definition are "lacking in importance to the aquatic environment—or where [their] importance is outweighed by other values—the Corps may always allow development * * * simply by issuing a permit." *Riverside Bayview Homes*, 474 U.S. at 135 n.9. Furthermore, the Corps has issued a "nationwide permit" that, in most cases, allows filling of up to ten acres of isolated waters without an individual permit. 33 C.F.R. 330.5(a)(26). It is thus not clear at this point that petitioner will be denied permission to develop its land or significantly limited in the manner in which it may do so. Petitioner's speculations regarding the impact of the decision below therefore do not furnish a basis for review. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-194 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-792

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

vs.

UNITED STATES, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

It is idle to conjecture why the United States and its allies are at such pains to evade, belittle or rewrite the question presented. One might have supposed that the administering agencies and the environmental groups would have welcomed the opportunity to obtain authoritative vindication for their reading of the Clean Water Act. As it is, however, Respondents' Oppositions require us briefly to restate the case in its true dimensions and to show that it is ripe for review in this Court.

1. *Revisionist Facts.* It ought not be necessary in this Court to quibble over facts. But, exercising all possible restraint, we must correct a few erroneous or misleading statements.

a. The Government has not resisted the temptation to "water up" the litigation site. Most of the 100 acres involved in the present petition (see Petition 3) do not constitute "seasonal bodies of water" (U.S. Br. in Opp. i); nor does most of the crystallizer acreage "fill with water during the rainy season, which comes in the winter and spring months." *Id.* at 5. It is disingenuous to borrow the casual shorthand of the court of appeals opinion when the undisturbed findings of the district court, accurately reflecting the record, describe a very different reality. See Petition 4-5. Here, at least, the other Respondents are more candid, stating that, in contrast to the "seasonally ponded" acreage (actually only 14 acres, Pet. 4 n.4), "[s]ome of these areas are 'ephemerally ponded,' that is, ponded only for a period of days or weeks after rainstorms." Save S.F. Bay Ass'n Br. in Opp. 2. See also *id.* at 6, 10. We add only that much of the "ponding" consists of a few inches of rainwater in the bottom of plowed furrows, and does not create anything resembling a shallow "lake" or "water body." See Pet. 4 n. 4; Pet. App. A-29, A-34 to A-35.

b. Equally misleading is the insistence of all Respondents that the "waters" in suit are not truly "isolated."[1] This is fudging. The

[1] This is accomplished by various means: by discussing the southern wetland "tips" or "corners" which are *not* before this Court; by characterizing those areas as "tidal," even though the District Court found

dispositive fact is that the only remaining assertion of jurisdiction over the former crystallizers and calcium chloride pits is on the basis that they constitute "other waters"—by definition isolated waters—whose only link to interstate commerce is claimed to be their use by migratory birds or endangered species. See Pet. App. A-8 to A-9, A-11 to A-12; U.S. Br. in Opp. 7, 10 n.9. It is far too late in the day to change the jurisdictional foundation of the case. Nor will it do to rewrite the Corps' regulations to obliterate the distinction there made between tidal and interstate waters and their adjuncts, on the one hand, and "other waters" isolated from the first class, on the other hand.

c. Finally, Respondents leave the impression that an endangered species, the salt marsh harvest mouse, uses the 100 acres still in dispute as habitat. U.S. Br. in Opp. 6; Save S.F. Bay Ass'n Br. in Opp. 11. The fact is that the only such rodents were found on or near the parcel corners no longer in suit. See *Id.* at 3. Nor are the crystallizers and pits of the remaining area potential habitat for the salt marsh harvest mouse. Accordingly, the reiterated references to "endangered species" are now anachronistic.

2. *Ripeness and Importance of the Issue.* There is no merit to the several pleas in avoidance now interposed: that the question we seek to present was addressed below only "somewhat obliquely" (U.S. Br. in Opp. 20) or not at all (Save S.F. Bay Ass'n Br. in Opp. 9-12); that it is "premature" or "not ripe for review" (U.S. Br. in Opp. 8-9, 20; Save S.F. Bay Ass'n Br. in Opp. 6-9); that it may become "moot" (U.S. Br. in Opp. 20; Save S.F. Ass'n

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otherwise (Pet. App. A-29 to A30) and the Court of Appeals did not reach the question (Pet. App. A-4 to A-5 n.5); by implying that Newark Slough is "adjacent" to the areas in dispute (see Save S.F. Bay Ass'n Br. in Opp. 10), notwithstanding that it is a quarter mile from the now irrelevant Parcel 10 (Pet. App. A-19) and about half a mile from any waters still in the case; and by baldly asserting that "[t]he property" (without distinguishing the "corners" no longer in dispute) is "an integral part of the San Francisco Bay estuary and wetland system" (Save S.F. Bay Ass'n Br. in Opp. 10), or, more modestly, that the waters before this Court "could reasonably be regarded as part of the same ecosystem" as the discrete corners "subject to tidal inundation by San Francisco Bay." U.S. Br. in Opp. 10 n.9.

Br. in Opp. 6, 9-10); and, in any event, that the issue has little practical importance (U.S. Br. in Opp. 21-22; Save S.F. Bay Ass'n Br. in Opp. 28-29).

a. Although the court below disposed of the argument swiftly,even cavalierly, there is no doubt that our question *was* decided, and there is no ambiguity about *how* it was decided. The court squarely held that the Clean Water Act "is broad enough to extend the Corps' jurisdiction to *local* waters which *may* provide habitat to migratory birds and endangered species." Pet. App. A-12 (emphasis added). In context, it is clear that "local" refers to "waters" embraced by the "other waters" regulation (33 C.F.R. 328.3(a)(3), Pet. App. A-44 to A-45)—which is to say, "isolated waters," unconnected to any tidal water, any interstate waterway, or any tributary of such waters. See Pet. App. A-11. Likewise, the reference to waters that "may" provide habitat to migratory or endangered species obviously invokes, and treats as legitimate, the so-called "EPA criteria" published in 1986 which extended jurisdiction to areas that "are or would be" used as habitat by migratory birds or endangered species. Pet. App. A-11 to A-12.

b. Nevertheless, because the court of appeals remanded the case, it is said review here would be premature. As we said in the petition (Pet. 22-23), the issue in no event will be mooted on remand since it is undisputed that some portion of the litigation site is the actual or potential habitat of some migratory birds and otherwise satisfies the standard approved by the court of appeals for "other waters" See Pet. 7, 22.[2] Accordingly, the question will remain in the case no matter how the "habitat" area is precisely delimited.[3]

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[2] We do not, of course, concede that the areas subject to only "ephemeral" ponding fall within the regulation. See Pet. 6 n.7; Save S.F. Bay Ass'n. Br. in Opp. 9-11.

[3] It is suggested by intervening respondents that the question presented would be mooted if the district court, on remand, were to uphold petitioners' estoppel plea. S.F. Bay Ass'n Br. in Opp. 6. Alas, that prospect is almost certainly foreclosed in respect to the Corps' present ground for asserting jurisdiction, a ground not available to it

Mere incantation of hoary formulae does not answer our submission that this is one of those instances in which the Court's intervention is appropriate notwithstanding the technically interlocutory character of the judgement because a significant legal question urgently calling for resolution is unavoidable and further skirmishing in the lower courts will only be wasteful.

c. Equally misleading is the claim that this Court need not hear the case because there is no conflict among the lower courts. Not only have substantial doubts been expressed in three Circuits, but the fact is that the United States' acquiescence in the Fourth Circuit's invalidation of the migratory bird "regulation" in *Tabb Lakes* (albeit on procedural grounds) creates a conflict between the substantive law applied in the States within the Fourth Circuit and that applied in the rest of the country. See Pet. 20-21.[4] Here, as we have explained, the issue tendered is the one the Court pointedly reserved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 138 n.8 (1985). If our submission on the merits is correct and those who administer the Clean Water Act have gone far beyond the limits set by Congress, with significant practical consequences, that is reason enough for the Court to intercede.

d. This brings us to perhaps the most startling of the Government's representations: that, contrary to our allegation, the decision below will have no far-reaching consequences, both because "cases in which the only connection to interstate commerce is use by migratory birds have been rare"—and, presumably, will continue to be so—and because it is "not clear at this point that petitioner will be denied permission to develop or significantly limited in the manner it may do so." U.S. Br. in Opp. 21-22. We

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when the United States expressly or impliedly disclaimed jurisdiction before 1985.

[4] As we have noted, the Government appears to be in no hurry to end this dual legal regime by initiating formal APA rulemaking. One advantage of delaying such a proceeding is presumably to avoid the serious risk of provoking an adverse ruling *on the merits* in the Fourth Circuit, given the "grave doubts" articulated in *Tabb Lakes*, and thereby creating a square conflict.

have already dealt with the second point. See Pet. 10, 22-23. The suggestion that cases like ours are numerically insignificant merits a word of rebuttal, however.

Given the novelty of asserting migratory bird use as a ground for asserting jurisdiction (see pp. 9-10, infra), it is not surprising that litigated cases so far have been few. But that does not tell us how commonplace will become such assertions of jurisdiction if this Court leaves the present ruling undisturbed. We stand by our estimate that "tens of millions" of acres will be affected--a conclusion based on official Government publications. See Pet. 8-9 n. 10.[5] We may add that the filings of the concerned amici supporting our petition afford at least some evidence that the effect of the decision below is more than marginal.[6]

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[5] Although the Fish and Wildlife Service apparently once supplied a figure of 13 million acres for "isolated wetlands" (Save S.F. Bay Ass'n Br. in Opp. 28 n. 13), that presumably did not include the very substantial Alaskan acreage. See Br. *A.C.* of Pacific Legal Foundation 9. At all events, as Senator Chafee remarked in the oversight hearings he chaired in 1985, the issue now presented involves a "tremendous number of wetlands." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 121 (1985) (hereinafter "*1985 Oversight Hearings*"). See, also, *id.* at 229.

[6]See Brief *Amicus Curiae* of the National Association of Industrial and Office Parks, International Council of Shopping Centers, Inc., National Association of Home Builders, National Multi Housing Council, and National Realty Committee in Support of Petitioners 3, 5, 9, 13; Brief Amicus Curiae of Pacific Legal Foundation and National Cattlemen's Association in Support of the Petition for Certiorari 2, 9; Brief of the American Forest Council, the American Paper Institute and the National Forest Products Association as *Amici Curiae* in Support of Petitioners 3, 8-11; Brief of *Amicus Curiae* American Mining Congress in Support of Petitioners 3; Brief of the Foundation for Environmental & Economic Progress as *Amicus Curiae* in Support of Petitioners 2, 5, 6-9.

Nor is there any basis for the claim that other links to interstate commerce will greatly diminish the impact of the challenged ground of jurisdiction. U.S. Br. in Opp. 21. No doubt, some isolated waters that

3. *Congressional Intent.* At the end of the day, the submission of respondents is that, in enacting the Clean Water Act, Congress wholly abdicated its defining function, eschewing any decision as to what effects on interstate commerce would justify federal regulation of local waters, and left the administering agencies entirely free to search out, from time to time, the constitutional limits of geographic jurisdiction, relying on the judiciary, if and when called upon, to curb any overstepping of the Commerce Clause. To say the least, there are serious problems with this scenario.

a. One may question the legitimacy of such a sweeping delegation of legislative power "not canalized within banks that keep it from overflowing," but "unconfined and vagrant." See *Schechter v. United States,* 295 U.S. 495, 551 (1935) (Cordozo, J., concurring). Perhaps more immediately, however, doubts arise about the constitutional propriety of an *administrative* invocation of Commerce Clause power to reach wholly isolated sites on the sole ground that they may be used by out-of-state birds. It is far from clear that Congress itself could expressly legislate such a result, at least in respect of use by *unprotected* migratory birds, many of which are not even waterfowl. See Br. A.C. of Pacific Legal Foundation 16-19.[7] But, even if Congress could do so, on the basis of full legislative consideration and articulated findings, it does not follow that a mere administrative agency, acting without an explicit Congressional mandate, is equally free to exercise constitutional power to the same boundary. Special

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attract migratory birds or endangered species will also attract interstate human visitors and a few will breed fish destined for out-of-state markets. E.g., *United States v. Byrd,* 609 F.2d 1204, 1210 (7th Cir. 1979); *Utah v. Marsh,* 740 F.2d 799, 803-804 (10th Cir. 1984). But that will not usually be the case with respect to the more typical, relatively small, non-navigable isolated waters or wetlands—especially when, as here, the site is mainly used by ordinary upland birds of no special interest to hunters or birdwatchers.

[7] Indeed, at the oral argument of *Riverside Bayview Homes,* at least one Member of the Court seemed dubious whether an "aerial connection" through migrating bird use could bring isolated waters or wetlands within the sway of the Commerce Clause. Tr. Or. Arg. 21-24.

deference is due to the constitutional determination of legislators directly entrusted by the Constitution itself with the task of assessing the need for national solutions. *E.g., Katzenbach v. McClung,* 379 U.S. 294, 303-305 (1964); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 276-27 (1981); *Metro Broadcasting v. F.C.C.,* 111 L.Ed.2d 445, 462-464 & nn. 11-13 (1990). No like presumption operates in favor of implementing agencies, whose "expertise" and practical experience justifies deference to their reading of statutes, but not the Constitution. See *Hampton v. Mow Sun Wong,* 426 U.S. 88, 103-104, 114-116 (1976); *Greene v. McElroy,* 360 U.S. 474, 507 (1959).[8]

b. Moreover, constitutional objections aside, it must be deemed most unlikely that Congress would legislate so irresponsibly. If the Constitution sets the only boundary, there is nothing to prevent the agencies from regulating for reasons that are unrelated—or only very remotely related—to the legislative goals. Thus, although Congress was concerned with water quality, EPA and the Corps of Engineers, goaded by the Fish and Wildlife Service, might be inclined to preserve isolated waters whose filling would in no way affect the objective of clean water, but *would* prejudice commercial fish or migratory birds or other wildlife. As we have noted, the United States itself has vigorously argued that the Corps of Engineers was given no such broad power in the Clean Water Act. See Pet. 18 & n. 20.

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[8]We do not press the constitutional question here because it is a rare case in which a regulation that oversteps constitutional boundaries is to be voided on that ground. Absent the clearest indication to the contrary, one must of course assume that Congress did not intend to authorize the administrators to act unconstitutionally, and, accordingly, the excessive regulation normally should be faulted as unauthorized. See *Greene v. McElroy, supra; Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974). That is our present submission. At the least, one is entitled to doubt that, absent a clear statement of such an intention, Congress meant to unleash those charged with implementing the statute to cross into such dangerous territory. See Tribe, *American Constitutional Law* 316-317 (2d ed. 1988).

c. To be sure, it is said that we read the goals of the Act too narrowly and we are reminded that the statute expressly adverts to protecting "fish, shellfish and wildlife." U.S. Br. in Opp. 11. This is a false point. Of course, the underlying reasons for wishing to achieve clean water include protection of wildlife, as well as protection of the human population, concern for "aesthetic, recreation and economic values," and the facilitation of navigation. See 33 U.S.C. 1343(c)(1)(A)-(C), 1344(b) & (c). And the ability of a waterbody to sustain fish and shellfish is also a stated test of water quality. 33 U.S.C. 1251(a)(2). The fact remains, however, that the focus of the Clean Water Act is *pollution*; whatever benefits result, the Congress was here concerned to "restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. 1251(a). If we were dealing with a wildlife protection statute, it would not permit—as the Clean Water Act does—the destruction of fish or bird or animal habitat by any means other than the discharge of pollutants. See Petition 11-12.

d. We do not find in the Respondents' Briefs any serious response to our points on the statutory text and the legislative history of the 1972 statute. See Petition 13-17. Much reliance is placed, instead, on a few remarks made during the 1977 amendments to the Clean Water Act, together with the suggestion that Congress then approved the Corps' more expansive regulations promulgated that year. This is accompanied by repeated invocation of this Court's decision in *Riverside Bayview Homes, supra,* without any recognition of the very limited holding there vindicating only the regulation of wetlands immediately *adjacent* to true navigable waters, not *isolated* waters.

When all is said and done, however, Respondents can point to only one statement explicitly treating "isolated wetlands and lakes" as properly within the Corps' jurisdiction. U.S. Br. in Opp. 14. That was the comment of a single Representative in an extension of his oral remarks—hardly an authoritative statement of what the Congress as a whole intended. At all events, there is *not a word* remotely suggesting that jurisdiction could be predicated on the use, or potential use, of a site by migratory birds. That adventurous idea was first mentioned in *1985* Hearings—obviously much too late to illumine the intent of the Congress

that wrote Section 404 in 1972. See Save S.F. Bay Ass'n Br. in Opp. 13, 23-26. As Judge Rymer noted here, the argument for legislative ratification of regulations in this context is not remotely comparable to what the Court endorsed in *Riverside*. See Pet. App. A-13 to A-14 n. 1.

4. *Administrative Construction.* We have submitted that the administrative construction of the Clean Water Act reflected in the 1986 "advice" about migratory bird use as a sufficient interstate commerce nexus is not arguably a "reasonable" reading of the statute and, accordingly, must be rejected. Pet. 17-18. We added that deference to the Corps' new statutory construction was in any event inappropriate, given that the new ground of jurisdiction was only espoused in 1985—13 years after the statute was enacted—and, even then, under duress, not as a consequence of a well-considered expert judgment based on experience. Pet. 18-20. The Government now responds that the migratory bird use rule was *not* born in 1985, but in fact dates back at least to 1977, the only new feature being the acceptance of mere *potential* use as sufficient. U.S. Br. in Opp. 18-19 & n.15. At this point, we must cry "foul."

a. The evidence cited by the Government—the belated and self-serving statement of Acting Assistant Secretary of the Army Dawson during the 1985 Oversight Hearings (U.S. Br. in Opp. 18)—simply is not credible, and was not credited by the questioning Senators. See *1985 Oversight Hearings* at 105-106, 113-115, 121. Earlier in the hearing, Mr. Dawson declined to answer the direct question by Senator Mitchell whether he agreed "that isolated wetlands are within the Corps' section 404 jurisdiction where they are used by migratory fowl, waterfowl, which establishes the interstate basis for jurisdiction." *Id.* at 115. *See also id.* at 116.[9] The truth is that, under continuing pressure from the

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[9] Note that the formulation, at this stage, is limited to *actual* use by *waterfowl*. Even so, Mr. Dawson could not commit himself, orally or, later, in writing.

Still earlier, Mr. Dawson had expressed his view that "Section 404 is not a federal land use control statute" or "a wetland protection mechanism." *1985 Oversight Hearings* at 37, 61. He was duly taken to task for

Committee, the Corps eventually accepted the full migratory bird use rule. See *id.* at 168, 171-172, 203, 204-205, 208-209, 212. But that is a far cry from a showing that it was always accepted. See generally Save S.F. Bay Ass'n Br. in Opp. 23-36. It is no accident that migratory bird use was never articulated as a sufficient link with interstate commerce in any regulation or other written directive before 1985. See 1975 Corps Regulations, 40 Fed. Reg. at 31324; 1977 Corps Regulations, 42 Fed. Reg. at 37144; 1982 Corps Regulations, 47 Fed. Reg. at 31810-31811; 1983 Proposed Corps Regulations, 48 Fed. Reg. at 21474-21475. Whatever individual Districts might do, it was *not* general Corps policy to assert jurisdiction on any such basis. See, *e.g.*, *id.* at 113-115, 121-123.

b. At all events, the *matter* was fully aired and decided in *Tabb Lakes*, supra. The District Court there expressly found that the migratory bird use criterion announced in 1985 effected "a change in Corps policy" which carried "far-reaching" consequences. 715 F.Supp. at 728, 729. As we have noted, that decision was affirmed by the Fourth Circuit "on the district court's opinion." 20 ELR at 20009, 30 ERC at 1511. That should be the end of the matter.

For the reasons stated here and in the Petition, a writ of certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

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January 31, 1991

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those remarks (*id.* at 37, 96, 99), his nomination as Assistant Secretary was opposed on this ground (*id.* 298-301, 315-317), and the nomination hearing was postponed (*id.* at 156-157).

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No. 90-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL MULTI HOUSING COUNCIL, AND NATIONAL REALTY COMMITTEE IN SUPPORT OF PETITIONERS

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I. INTRODUCTION

The National Association of Industrial and Office Parks, International Council of Shopping Centers, Inc., National Association of Home Builders, National Multi Housing Council, and National Realty Committee file this brief *amici curiae* in support of Petitioners. The consent of counsel for each of the parties has been obtained and copies of a letter from each counsel indicating his consent have been filed

with the Clerk. *Amici* represent a broad cross-section of interests affected by the lower court's decision not represented by the petitioners or by the particular property at issue in this case. In addition, *Amici's* brief focuses on an issue not fully presented in the petition for writ of *certiorari*, i.e., the statutory concept of "waters of the United States," including the statutory purposes and structure, and the importance of the distinction between the term "waters of the United States" and all waters within the United States.

II. INTERESTS OF *AMICI CURIAE*

The National Association of Industrial and Office Parks (NAIOP) is an association formed in 1967 whose more than 7,000 member companies are developers and owners, mortgage bankers, contractors and constructors, municipalities and development commissions, and numerous other adjunct disciplines representing the industrial and office park industry.

The International Council of Shopping Centers, Inc. (ICSC) is the trade association for the shopping center industry. ICSC has over 28,000 members worldwide. Its members include developers, retailers, lenders, owners, managers and others having a professional interest in the shopping center industry. Its members represent virtually all of the 35,000 shopping centers in the United States.

The National Association of Home Builders (NAHB) represents 160,000 builders and associate members in all fifty states, the District of Columbia and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial

builders, as well as land planners, land developers and remodelers.

The National Multi Housing Council (NMHC) represents the interests of the multifamily rental housing industry. The members of NMHC are engaged in all aspects of the development and operation of rental housing, including the ownership, building, financing, management, and conversion to condominium or cooperative ownership of such properties.

The National Realty Committee (NRC) represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The development and building industries are among those industries in the nation most directly and adversely affected by the decision of the court below. If the lower court's decision is allowed to stand, NAIOP, ICSC, NAHB, NMHC and NRC members and many others who plan, finance, and carry out vital economic development projects for the benefit of the nation and its people will be severely affected by the removal of countless environmentally-sound and economically-viable development sites from the nation's already limited roster of developable sites.

Section 404 of the Clean Water Act requires those who wish to discharge dredged or fill material into "waters of the United States" to secure a permit from the U.S. Army Corps of Engineers (the "Corps"). In conjunction with the U.S. Environmental

Protection Agency (the "EPA"), the Corps has promulgated regulations setting forth criteria to guide the section 404 permit decisionmaking process (the "Guidelines"). 40 C.F.R. Part 230 (1990). The Corps also has promulgated its own set of section 404 regulations establishing a detailed "public interest" balancing process for determining whether a permit should be issued or denied.

NAIOP, ICSC, NAHB, NMHC and NRC members and others who develop large or small scale projects potentially subject to 404 program prohibitions and restrictions have long understood both the basic jurisdictional scope of the section 404 program and the particular requirements of the Guidelines, as well as the Corps' public interest review regulations. In 1989, however—at the same time the court below was considering the section 404 jurisdictional issue raised in this case—the Corps and EPA were developing a new, internal Memorandum of Agreement (the "MOA") on the type and level of "mitigation" necessary to comply with the Guidelines.

The MOA drastically alters the Corps' regulatory approach to permit decisionmaking for "special aquatic sites," including wetlands. In essence, it rescinds and supersedes the Corps' public interest review regulations. In place of a general balancing process, only one question need be asked, for example, with respect to a proposed project involving wetlands: Are wetlands involved? If so, issuance of a permit is presumptively contrary to the public interest. Only if the avoidance of wetlands is "impracticable" will other public interest factors even be considered. Thus, the MOA could frequently result in permit denial if wetlands are involved, even if the

proposed development has substantial economic and social benefits, *e.g.*, low-cost housing, jobs, public transportation, etc., and even if there are proposed positive environmental benefits to be gained through compensatory mitigation.

Although NAIOP, ICSC, NAHB, NMHC and NRC believe the MOA itself is an unlawful revision of the established Guidelines and the Corps' public interest review regulations, the point to be made here is that—when combined with the Corps' new "migratory bird" jurisdictional standard for redefining the scope of the section 404 program upheld by the court below—industrial and office parks developers, shopping center developers, home builders and developers of other income-producing property face the prospect of literally millions of acres of developable land being placed "Off Limits" by the Corps, no matter how substantial the benefits of proposed projects on these lands might be.

III. SUMMARY OF ARGUMENT

The court below, in holding that

> "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species . . . ,

has, in the name of protecting the quality of the nation's federal system of navigable waterways, engrafted onto the Corps of Engineers' definition of "waters of the United States" a radically new, implausible, and potentially massive federal intrusion into the state and local water management and pollution control domain, as well as local land use decisionmaking. Under the court's reasoning, all man-

made or natural depressions in the land which even temporarily contain virtually any amount of rainwater are deemed sufficiently "wet" as to be legally indistinguishable from wetlands, intermittent streams, or playa lakes, for example, which are subject to regulation by the Corps to the extent they could affect interstate commerce. Moreover, if any migratory birds or endangered species may inhabit these rainwater-wetted depressions, even temporarily, that alone would provide a sufficient nexus to interstate commerce for federal regulatory purposes. In essence, "waters of the United States" would be defined by the peregrinations of migratory birds, far beyond the physical, hydrological, and geographical concepts and limits imbedded in the statute and the established regulations of the Corps of Engineers. As discussed below, *amici* do not believe the statutory concept of "navigable waters" and the Corps' regulatory definition of "waters of the United States" can or should be stretched to this extreme or be defined by such an inherently arbitrary migratory bird standard.

It is accepted law that the term "waters of the United States," as used in the Clean Water Act, is not limited to traditional notions of navigability. Courts have upheld its application, for example, to certain non-navigable, man-made surface water impoundments, to certain natural surface depressions which hold water only on a seasonal basis, and to certain waters which, among other things, provide habitat to migratory birds or endangered species. Prior to this case, however, no court has interpreted "waters of the United States" in such a manner as to sanction federal control over all minimally wet surface depressions whose sole nexus to interstate com-

merce is the sometime potential presence of migratory birds or endangered species. No court has previously sanctioned federal regulation of the millions of additional acres of man-made and natural surface depressions that are encompassed by the court's decision. Such a sweeping expansion of the Corps' section 404 regulatory jurisdiction—to include virtually all areas where the rain falls and the birds fly (and come to rest)—is not required or authorized by the Clean Water Act, nor is it in the public interest.

IV. ARGUMENT

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill material into "navigable waters" without a permit from the Corps of Engineers. 33 U.S.C. § 1344 (1982). The term "navigable waters" is defined in the Act as all "waters of the United States." 33 U.S.C. § 1362(7) (1982). The Corps, in turn, has defined "waters of the United States" by regulation to encompass seven general classifications of waterbodies. 33 C.F.R. § 328.3(a) (1990). The only such classification relevant to this case—sometimes referred to as the "isolated waters" classification because these waters are not physically or hydrologically connected to any other Corps-defined "waters of the United States"—is "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands [including wetlands adjacent to other defined 'waters of the United States'], sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . . " 33 C.F.R. § 328.3(a)(3) (1990).

The court below upheld the Corps' determination that the property here in question—petitioners' abandoned salt crystallizers and calcium chloride pits, which sometimes contain a few inches of collected rainwater—qualified as "other waters" under the foregoing classification because the property's use or alteration could affect interstate birds (it is unclear whether the endangered mouse involved here also is an interstate species or how it otherwise could affect interstate commerce). Thus, the court concluded that these artificially created, "seasonal" waterbodies, which sometimes may be inhabited by migratory birds or endangered species, are subject to the Corps' section 404 regulatory jurisdiction. *Amici* submit that such an extreme result is not apparent on the face of the Clean Water Act or the Corps' regulations, and was not within the contemplation of the drafters of the statute or the regulations.

The statute itself evidences an intent that the term "waters of the United States," which the statute does not define, be construed in light of the statutory purpose to prevent discharges of dredged or fill material into such waters if they will have an unacceptable adverse effect on certain specified water quality-related uses of what for present purposes will be termed "federal waters," *i.e.*, on the use of such federal waters for municipal water supplies, shellfish beds and fishery areas, wildlife, and recreational areas. 33 U.S.C. § 1344(c) (1982). Fundamentally, therefore, if these specified water quality-related uses of "federal waters" are not implicated with respect to a particular local area or activity, the "local waters" involved are not subject to the prohibitions or restrictions of the Corps' section 404 program.

Courts interpreting the term "waters of the United States" under the Clean Water Act have affirmed its reach beyond traditional "navigable waters" but, prior to the case at bar, they have found federal jurisdiction to exist only in cases involving actual navigable waterways, immediate tributaries to navigable waterways, and wetlands adjacent to navigable waterways. *See, e.g., Utah v. Marsh*, 740 F.2d 799, 800-01 (10th Cir. 1984) (navigable lake of 150 square miles); *United States v. Byrd*, 609 F.2d 1204, 1205 (7th Cir. 1979) (2,500 to 3,000 acre navigable lake); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1380-81 (D.D.C. 1975) (mangrove swamp below mean high water, adjacent to navigable waterway); *United States v. Holland*, 373 F. Supp. 665, 667, 673, 676 (M.D. Fla. 1974) (tidal canals and wetlands adjacent to navigable waters, frequently flooded by tidewater). No court has previously found federal jurisdiction to exist where there is no physical or hydrological connection between a sometimes "wet" parcel of land and the federal waters and uses thereof which Congress intended the Clean Water Act to protect.

As a practical matter, virtually all land is sometimes wet, and virtually all land is free to be used by migratory birds or endangered species. It is evident from the structure as well as the purpose of the Clean Water Act, however, that Congress did not intend to subject to *federal* regulation virtually all the land surface within the United States on which rainfall is collected or channelized by nature or by man. Only certain collected and channelized waters were deemed to be within the proper legal and practical regulatory reach of federal law. The federal system of navigable waterways and waterbodies hydrologi-

cally connected thereto—waters "of" or belonging to the United States—defines the *federal* regulatory reach of the Clean Water Act.

In order to protect the quality of "federal waters," Congress devised two "point source" programs to regulate the discharge into these waters of pollutants generally (section 402 of the Act, administered by the United States Environmental Protection Agency ("EPA") and dredged or fill material specifically (section 404, administered by the Corps in consultation with EPA)). To the extent rainfall runoff from diffuse or "non-point" sources reaches federal waters, it also may be subject to control plans and requirements established under section 208 and other provisions of the Act. Beyond the reach of federal waters and federal regulatory programs, however, lie millions of acres of land surface within the United States upon which rainwater falls and is collected in varying ways and varying degrees by nature or by man, but which never reaches the physical, hydrological, or geographical limits of federal jurisdiction. Protection of the quality of these previously accepted non-federal waters is solely within the province of state and local governments.

To overcome the federal government's inability to regulate those waters and activities which lie beyond the previously accepted physical, hydrological, or geographical limits of "waters of the United States," it is difficult to imagine a more sweeping means of doing so than to allow the possible visitations of migratory birds to define "waters of the United States." In essence, this is what the Corps has proposed and what the court below has accepted. "Federal waters" jurisdiction over the land surface would be defined by

the whim of birds in the air. Such a basis for defining the jurisdictional reach of "waters of the United States" is either the epitome of arbitrariness or, perhaps, a mask for the proposition that virtually *all* surface waters *within* the United States are "federal waters" subject to the section 404 program. Beyond its inherent arbitrariness (or a revolutionary attempt to assert federal control over all surface waters within the United States), *amici* see two fundamental problems with this radically new way of defining "waters of the United States."

Substantively, there is no reasonable basis in the Clean Water Act to conclude that Congress intended or believed it was necessary for the Corps of Engineers to be the guardian of every pit, pond, and puddle in the nation that might be visited by a transitory bird or by an interstate traveler in search of an endangered mouse. If such was necessary to achieve the Act's purpose or had been Congress' intention, Congress might as well as have attempted to assert directly that federal jurisdiction exists over every waterbody of every description *within* the United States. It is evident, however, that Congress had no such intention.

The fact that Congress intended the Clean Water Act to protect the use of "waters of the United States" by "wildlife" and to protect "recreational areas," in addition to water supply and aquatic ecosystem uses of federal waters, does not mean that the term "waters of the United States" should be stretched beyond its otherwise reasonable limits. It cannot be assumed that Congress had in mind waters other than those which could affect *federal* wildlife preserves and *federal* recreational areas. More spe-

cifically related to this case, it is even less plausible that Congress understood, much less intended, that the word "wildlife" might be interpreted to include the jurisdictionally-expansive movements of migratory birds or that "recreational areas" might be interpreted to encompass the potentially far-reaching peregrinations of professional or recreational bird and endangered species watchers. Perhaps the best evidence that Congress did not contemplate such a result is the fact that it took EPA and the Corps themselves some 13 years (from the statute's enactment in 1972 until 1985) to discover this new, more expansive method of redefining "waters of the United States."

EPA's 1985 discovery of a migratory bird basis for expanding federal jurisdiction under section 404, and its subsequent informal endorsement by the Corps in 1986, leads to the second fundamental problem with the new migratory bird standard for defining "waters of the United States." It is an illegal "substantive rule," as the Fourth Circuit Court of Appeals so held in *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989), because it meets all the accepted criteria of a "rule" and was adopted by the Corps in violation of the notice and comment rulemaking requirements of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553 (1982).

If there is any doubt about what kind of pronouncement the Corps intended to issue in 1986, it should be clear from the Corps' assertions in the court below, as well as the court's own conclusion of law, that the Corps' new migratory bird jurisdictional standard is far more than a mere "interpretation" of existing law or statement of non-binding Corps policy.

It demonstrably expands, by millions of acres, the Corps' claimed jurisdiction to regulate dredge and fill activities associated with "local waters," activities and waters never previously covered by federal regulatory requirements.

Even if this Court should find that the Corps' new migratory bird jurisdictional standard is a permissible "interpretation" of the statute and the Corps' established regulations, the question arises as to what degree of judicial deference, if any, should be accorded the Corps' interpretation in deciding whether it is "reasonable." *Amici* submit that, having been adopted by *informal* means, *i.e.*, by a November 1985 Corps "Memorandum" and by preambular statements accompanying the Corps' November 1986 regulations, without any involvement by the public generally or the regulated community in particular, the Corps' new "interpretation" should be granted no greater judicial deference than that expressed by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. *See generally*, Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 Yale J. on Reg. 1 (Winter 1990) (in which Professor Anthony compares *Skidmore*, which involved agency "interpretative bulletins" and informal agency rulings, with *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which involved an agency interpretation made in the context of rulemaking, and discerns a frequently missing "step" in the judicial consideration of whether an agency has reasonably interpreted an issue on which the statute is either silent or ambiguous, *i.e.*, whether the agency's interpretation "in the format it uses" may be given binding effect.)

The Clean Water Act might well be considered somewhat ambiguous with respect to the intended meaning of "waters of the United States." The statute's interchangeable use of "navigable waters" and "waters of the United States," however, strongly indicates a close jurisdictional tie between "waters of the United States" and the federal navigational servitude under the Commerce Clause. U.S. Constitution art. I, § 8, cl. 3. As previous courts have ruled, however, "waters of the United States" does encompass certain other waters not historically deemed to be "navigable waters." For that reason, the term "federal waters," as used previously in this brief, may be more appropriate when referring to those waters subject to federal jurisdiction under the Clean Water Act. It seems clear, in any event, that "waters *of* the United States" (or "federal waters") is not the same as all waters *within* the United States.

If the Corps' intent, or the effect of the Corps' adoption of the new migratory bird jurisdictional

standard, is to establish "federal waters" jurisdiction over virtually all waters *within* the United States—which is the practical consequence of the court's decision below, even if it was not the Corps' actual intention—there should be no question regarding its status as a "substantive rule." The effect of changing "of" to "within" is to shift water pollution control, not to mention associated land use decisionmaking, almost entirely into the federal domain. Such a revolutionary change surely cannot be allowed without a clear Congressional directive (assuming such would be constitutionally permissible), much less be allowed by administrative agency fiat.

V. CONCLUSION

The lower court's ruling, which allows the Corps to expand its section 404 regulatory jurisdiction to include "local waters which may provide habitat to migratory birds and endangered species," is not authorized by or necessary to achieve the purpose of the section 404 program. The decision of the court below, moreover, ignores the structure of the Clean Water Act and its essential division of authority and responsibility as between the federal government and state and local governments. Beyond the established and generally well understood physical, hydrological, and geographical limits of federal jurisdiction over navigable waters and their adjunctive waters, the lower court has approved a revolutionary and extremely arbitrary new criterion for defining "waters of the United States" by reference to the possible flight plans and ground-level visitation choices of migratory birds. Such a jurisdictional standard, if not the epitome of arbitrariness, can only mean that the federal government now claims jurisdiction over vir-

tually all waters of every description *within* the United States.

For the foregoing reasons, in addition to those set forth in the Petition of Leslie Salt Co. and Cargill, Inc., *amici curiae* National Association of Industrial and Office Parks, International Council of Shopping Centers, Inc., National Association of Home Builders, National Multi Housing Council, and National Realty Committee respectfully urge the Court to grant *certiorari* and reverse the decision of the Court of Appeals.

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BRIEF OF *AMICUS CURIAE* AMERICAN MINING CONGRESS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is there any limit to the Army Corps of Engineers' jurisdiction under § 404 of the Clean Water Act, in which Congress authorized the Corps to regulate the discharge of dredged or fill material into "navigable waters"; or are all waters, including all land on which rainwater temporarily collects, subject to the Corps' control?

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BRIEF OF *AMICUS CURIAE* AMERICAN MINING CONGRESS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Mining Congress ("AMC") is an association of the mining companies that produce most of the Nation's metals, coals, and industrial and agricultural minerals, as well as the manufacturers of mining and mineral processing machinery, equipment, and supplies and the engineering, contracting and banking firms that

serve the mining industry. The hundreds of minerals produced by AMC members, ranging from bulk clay, stone, salt, gravel, and cement to the more precious gold, silver, iron, copper, lead, and zinc to the more exotic tungsten, titanium, beryllium, and zirconium, are indispensable to all of American industry, to agriculture (for fertilizer and farm implements, among other things), and to the national defense.

AMC has a compelling interest in the scope of the Corps of Engineers' ("Corps") jurisdiction over "navigable waters" under § 404 of the Clean Water Act ("the Act" or "CWA"), 33 U.S.C. § 1344 (1988), and is adversely affected by the limitless extension of that jurisdiction by the decision of the court of appeals in this case. Under § 404, a permit must be obtained "for the discharge of dredged or fill material" into navigable waters. The Corps' regulations are quite encompassing, however, and extend the Corps' jurisdiction to include numerous activities regularly engaged in by mine operators.[1] Access and haulage roads must be built and a variety of structures must be constructed. Impoundments must be created to supply water for mineral extraction and processing, for fire-fighting, for reclamation, and for waste treatment, to name only a few of the activities potentially subject to Corps regulation. Because AMC mem-

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[1] For example, the

> *discharge of fill material* means the addition of fill material into the waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; . . . reclamation devices such as riprap, groins . . .; levees; [*et al.*].

33 C.F.R. § 323.2(f) (1990). In the development, operation, and reclamation of a mine many of these activities must be conducted.

bers must continually dig up, dredge, fill, reshape, reconfigure and then reclaim land in order to produce America's mineral wealth, and are already subject to extensive local, state, and federal land use and environmental strictures governing these activities, they are substantially concerned that the court of appeals' decision will impose additional time-consuming, costly, and potentially preclusive regulatory hurdles. Particularly troubling is the uncertainty the decision creates as to whether there is *any* property over which the Corps cannot now claim regulatory control under the Clean Water Act. For these reasons, AMC submits this brief in support of the petition for certiorari.[2]

STATEMENT

This case arises out of the Corps' issuance of cease and desist orders to Petitioner Leslie Salt Company under § 404 to compel it to stop digging a ditch and siltation pond and plugging a culvert on its own property two miles from San Francisco Bay. Pet. App. A-2. Although part of the property had been incidentally altered by federal and state agency actions that had the effect of hydrologically connecting its southern perimeter with the Newark Slough (a tidal arm of San Francisco Bay), thus creating some wetland features there, the issues raised by the Corps' assertion of jurisdiction over those lands are not the subject of the Petition. Rather, Petitioner seeks review only of that part of the court of appeals' decision concerning the Corps' assertion of jurisdiction over the remainder of the property, consisting of man-made crystallizers and calcium chloride pits once used in manufacturing salt, as "navigable waters" subject to its regulatory control. Pet. 3-4.

In developing its salt production facilities out of dry pastureland in the early part of the century, Petitioner

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[2] The parties' letters of consent, pursuant to Rule 37 of the rules of this Court, have been filed with the Clerk.

dug pits for depositing calcium chloride and excavated large shallow basins in which the soil was compacted to create watertight earthen containers. Salt brine produced by Petitioner's evaporation ponds located closer to the Bay was pumped into the basins (the crystallizers) to crystallize the salt. After the salt had precipitated and the remaining liquid had been drawn off, the salt was mechanically harvested, and the crystallizers were drained, releveled and recompacted to start the process again. Pet. App. A-2.

Salt production ceased in 1959, but the pits and crystallizers remain. Pet. App. A-2. The property is "dry most of the year" except that rainwater temporarily accumulates, ponding on the land "for a short time immediately after winter rains." Pet. App. A-32, A-34. However, the Corps claimed that the crystallizers and the pits were "navigable waters" subject to its control under § 404 as defined and implemented by 33 C.F.R. § 328.3(a)(3) (1990), which extends Corps jurisdiction beyond "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (§ 328.3(a)(1)); beyond "[a]ll interstate waters including interstate wetlands" (§ 328.3(a)(2)); beyond "wetlands adjacent to [other regulated waters]" (§ 328.3(a)(7)); beyond "tributaries of [other regulated waters]" (§ 328.3(a)(5)); beyond "impoundments of [other regulated waters]" (§ 328.3(a)(4)); and beyond the "territorial seas" (§ 328.3(a)(6)), to include also:

> *All other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

33 C.F.R. § 328.3(a)(3) (1990) (emphasis added).

The district court rejected the Corps' jurisdictional claims and held that the crystallizers and pits were not "other waters" subject to regulation under § 328.3(a)(3) because the Act and the regulations did not cover such man-made, artificial "waters," nor did it apply to property that is dry most of the year and only temporarily wet during the rainy season. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 485-86 (N.D. Cal. 1989), Pet. App. A-15, A-33. Accordingly, the district court did not reach the issue of whether the "use, degradation or destruction of [the temporarily wet pits and crystallizers] could affect interstate or foreign commerce" under § 328.3(a)(3). 700 F. Supp. at 484, Pet. App. A-31.

The court of appeals reversed. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), Pet. App. A-1. Finding no impediment to Corps jurisdiction in the man-made, artificial nature of the impoundments, or in the temporary or seasonal nature of the water, the court remanded the case to the district court for it to address the interstate commerce issue. In doing so, however, the court of appeals directed the district court that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local

waters which may provide habitat to migratory birds and endangered species." 896 F.2d at 360, Pet. App. A-12.[3]

Judge Rhymer dissented from the majority on the crystallizers and the pits, reasoning that they were not "other waters" within the scope of § 328.3(a)(3) because the temporary ponding of rainwater "creates no hydrological connection with any other body of water." 896 F.2d at 361, Pet. App. A-13. She also specifically questioned, but found it unnecessary to address, the majority's "hold-[ing] that 'the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species' " because the real question was not the limits of the commerce power "but whether Congress meant to extend Corps' jurisdiction under the Clean Water Act to the full extent of its commerce clause power." *Id.* at 361 n.1, Pet. App. A-13 to A-14.[4]

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[3] The court of appeals noted that the Federal Register preamble to § 328.3(a)(3) reflects the Corps' interpretation that any waters which are or could be used as habitat by migratory birds or endangered species satisfy the interstate commerce prerequisite. The court also noted evidence in the record that such a nexus did exist. 896 F.2d at 360, Pet. App. A-11 to A-12.

[4] Judge Rhymer then restated the issue, implying her doubt whether "[it is] reasonable for Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as habitat?" 896 F.2d at 361 n.1, Pet. App. A-13.

ARGUMENT

It is particularly important that the Court grant review because this case is just the tip of an iceberg that is usually submerged from judicial scrutiny. Unfortunately, because of uncertainty over the proper limits of the Corps' jurisdiction, and because of the potentially crippling costs and delays that can result from a CWA cease and desist order and any subsequent challenge to it, most mining companies and other property owners dare not risk non-compliance with Corps dictates, even when the Corps exceeds apparent statutory limits on its jurisdiction. This case thus represents a rare opportunity to correct a profound problem of agency overreaching. In addition, as explained more fully below, this case is not merely a one-time aberration of little enduring consequence. On the contrary, the court of appeals' decision is only the latest and most extreme example of a line of unreviewed lower court decisions which will proliferate unless this Court steps in.

I. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED BY THIS COURT BECAUSE CONGRESS LIMITED THE CORPS' JURISDICTION TO "NAVIGABLE WATERS," NOT TO THE FULL EXTENT OF THE COMMERCE POWER.

The court of appeals has effectively written out of the Clean Water Act Congress' express limitation of the Corps' jurisdiction to the Nation's "navigable waters." Unchanneled by that statutory limitation, the Corps' jurisdiction knows no real boundary. Unless this Court acts to rectify this misinterpretation of the Act, the mining industry and all other landowners will be in constant jeopardy of CWA enforcement sanctions (including stiff civil and criminal penalties, as well as injunctive restrictions) as they go about their normal and heretofore lawful use of their nonnavigable lands.

A. Congress Did Not Authorize The Corps To Regulate To The Limits Of The Commerce Power.

The court of appeals erred in skirting past the critical question whether Congress authorized the Corps to regulate to the farthest reaches of the federal commerce power. Indeed, because that is the very premise of the Corps' expansive regulation of "other waters," the court never really questioned whether the regulation was consistent with the Act in the first place, as required by the second stage of the analysis this Court prescribed in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).[5] The Corps' regulation cannot survive that second-stage analysis.

Congress did not confer such unconstrained jurisdiction on the Corps in § 404 of the CWA. It limited the Corps' jurisdiction to "navigable waters." Admittedly, as this Court has concluded from the legislative history and purposes of the CWA, Congress in defining "navigable waters" as "the waters of the United States," CWA § 502(7), 33 U.S.C. § 1362(7), intended to broaden the Corps' jurisdiction beyond waters that satisfied "traditional tests of navigability," *Riverside Bayview Homes*, 474 U.S. at 133,

> and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92-1236, p. 144

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[5] In *Riverside Bayview Homes*, the Court adopted a two-stage analysis for determining whether the Corps may require a permit for placing fill material on property:

> [W]e must determine [1] whether [the] property is [a regulated water] within the meaning of the applicable regulation, and, if so, [2] whether the Corps' jurisdiction over "navigable waters" gives it statutory authority to regulate discharges of fill material into such [class of waters].

474 U.S. at 126.

(1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep Dingell).

474 U.S. at 133.

It is one thing, however, to say that Congress intended that the Corps not be bound by traditional notions of navigability and "to regulate at least *some* waters" not previously deemed navigable, *id.* (emphasis added), and quite another to then conclude that Congress intended the Corps to regulate virtually *all* waters and *all* lands on which rainwater may temporarily collect because someone has dug a hole there, permitting migratory birds to habitate briefly there. *See id.* Yet, that is what the Corps has done in promulgating 33 C.F.R. § 328.3(a)(3) and applying it here. Its interpretation of the Act is unreasonable by any standard and deserves no deference.

Congress stopped well short of authorizing the Corps to regulate whatever lands and waters the Commerce Clause could reach. Indeed, it retained the term "navigable waters," a regulatory term of art with longstanding and established significance; it must be presumed that at least *some* element of limitation was intended by those words, and that Congress intended to require *some* meaningful nexus with navigable water as a prerequisite to Corps control. Significantly, the conference report passage to which this Court looked in *Riverside Bayview Homes* did not extend the Corps' powers to the limits of the Constitution, as the Court obviously recognized in expressly leaving open the question of whether the Act conferred jurisdiction over "other waters." 474 U.S. at 131-32 n.8. Rather, the conference committee explained its intent "that the term 'navigable waters' be given the broadest possible constitutional interpretation. . . ." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Had Congress not intended to anchor the Corps' jurisdiction in "navigable waters," it would have simply authorized the exercise of its unencumbered Commerce Clause powers, as it did in numerous other statutes. *See, e.g.,*

§ 102(m) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(m) (1988) (purpose of the statute is "wherever necessary, [to] exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.").

The court of appeals' decision is founded on a fundamental misinterpretation of the Act. The Petition presents an important question of federal law and should be granted.

B. Review Is Especially Important Here Because Courts Will Otherwise Continue To Make The Same Mistake.

The Court should review the court of appeals' decision because it is not an isolated error or a passing aberration. Although the court below has broadened the jurisdiction of the Corps beyond any previously recognized limit, the panel decision is nonetheless consistent with and a logical extension of a line of unreviewed lower court decisions that, without correction by this Court, threaten to become the illegitimate law of the land.

As did the panel below, several courts of appeals have now embraced the proposition that the Corps' § 404 jurisdiction is coextensive with the commerce power, sequentially citing each other and an unjustifiably expansive reading of the same legislative history to which this Court looked in *Riverside Bayview Homes*. This is illustrated by the statement of the Eleventh Circuit, with string citation in *United States v. Lambert*, 695 F.2d 536 (1983):

> It is generally agreed that Congress intended "waters of the United States" to reach to the full extent permissible under the Constitution. *See United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *Leslie Salt v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978);

United States v. Ashland Oil & Transportation Co., 504 F.2d 1317, 1324-25 (6th Cir. 1974).

695 F.2d at 538.

The Corps has proclaimed its plenary jurisdiction over "other waters" in § 328.3(a)(3) because these lower court decisions have gone unreviewed. The Court's guidance is urgently needed now to avoid a continuing misapplication of the Clean Water Act.[6]

II. EVEN IF CONGRESS INTENDED THE CORPS' § 404 JURISDICTION TO BE COEXTENSIVE WITH THE REACH OF THE COMMERCE CLAUSE, THE REGULATION IS INVALID BECAUSE IT EXCEEDS THAT LIMIT.

Although there is no support in the Act or in its legislative history for extending the Corps' jurisdiction to the limits of federal constitutional power, the regulation would in any case be invalid because it exceeds even those broad limits. Both the regulation on its face and the Corps' sweeping interpretive extension of it in its Federal Register rulemaking preamble are defective on that basis.

The regulation improperly provides for Corps jurisdiction over any "other waters . . . the use, degradation or

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[6] The need for review is not diminished by the fact that the Corps may choose (1) to exempt some impoundments and other facilities or activities, subject to compliance with certain conditions (*see, e.g.*, 33 C.F.R. § 330.5(a)(14), (21) (1990), authorizing nationwide permits for minor road crossing fills and for certain otherwise regulated surface coal mining activities subject to conditions, such as under § 330.5(b) and § 330.8); or (2) to make case-by-case discretionary exceptions (*see, e.g.*, 51 Fed. Reg. 41,206, 41,217 (1986), noted by the court of appeals, expressing the Corps' intent to exempt certain artificially created waters, "subject to jurisdiction on a 'case-by-case' basis of review," 896 F.2d at 360, Pet. App. A-10). An unlawful assertion of jurisdiction gains no legitimacy from the agency's intent to abstain sometimes from actually exercising it.

destruction of which *could* affect interstate . . . commerce including any such waters [which] *could* be used" in a variety of ways such as "by interstate or foreign travelers for recreational or other purposes." § 328.3(a)(3). Predicating agency jurisdiction on such a hypothetical or speculative potential effect on interstate commerce does not pass constitutional muster. First, the "Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution. *See United States v. Nixon*, 418 U.S. 683, 703-05 (1974)." *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988). Second, as explained by the Chief Justice, "it [is not] sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce." *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 310 (1981) (Rehnquist, J. concurring) (emphasis in original). *See also id.* at 312. The regulation's reliance on a merely *potential* effect of *any* magnitude does not meet this standard.

Equally troubling is the Ninth Circuit's imprimatur on the Corps' interpretive extension of the regulation "to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt*, 896 F.2d at 360, Pet. App. A-12. Whatever legitimacy there may be to the regulation's facial extension to waters which could affect interstate commerce, there can be no justification for predicating federal regulation of local private property solely on the basis that migratory birds may sojourn there. No backyard birdbath or family goldfish pond is safe from federal regulatory control if that is a sufficient effect on interstate commerce to authorize Corps jurisdiction. The regulation, as interpreted and applied to sustain the Corps' jurisdiction over the calcium chloride pits and crystallizers, goes too far.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1990

LESLIE SALT CO. AND CARGILL, INC.,
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v.

UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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---

BRIEF OF THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Foundation for Environmental and Economic Progress (the "Foundation") respectfully files this brief as *amicus curiae* in support of Petitioners. The Foundation has obtained written consent from counsel for Petitioners and Respondents to file this brief. The consent letters have been filed with the clerk's office.

INTEREST OF *AMICUS CURIAE*

The Foundation is a non-profit corporation whose members include over 15 real estate and community developers. The Foundation's members are involved in the development of large-scale commercial and residential projects throughout the country, and, as a result, have substantial experience with the regulation of wetlands

and other waters of the United States under Section 404 of the Clean Water Act. Accordingly, the Foundation believes it can assist the Court in obtaining an additional perspective on the issue presented in the underlying case. Moreover, because the question raised in this case restricts the development potential of vast areas of land, this Court's resolution of the issue presented would be of great significance to the Foundation's members and a substantial number of similarly situated developers and landowners.

SUMMARY OF ARGUMENT

The issue in this case is the scope of the U.S. Army Corps of Engineers' regulatory jurisdiction under Section 404 of the Clean Water Act. The U.S. Court of Appeals for the Ninth Circuit held in the decision below that federal jurisdiction extends to isolated areas which pond after rainfall because such areas "may" be used by migratory birds and therefore could affect interstate commerce. The Supreme Court should grant the petition for a writ of certiorari because of the pressing need for Supreme Court guidance regarding the proper scope of federal regulatory authority under Section 404.

The "migratory bird" policy is of critical importance to any person who wants to use and develop property. The Ninth Circuit's approval of this policy gives the federal government authority to regulate virtually any property determined to be a "water" simply because the property "could" be used by migratory birds, even absent actual use. The Corps of Engineer's migratory bird policy, coupled with its recent policy claiming jurisdiction over previously unregulated "waters," constitutes a broad expansion of federal regulation under the Clean Water Act. Such a major expansion of regulatory authority should not be approved by this Court absent evidence that Congress had granted this authority, which is not present here. Furthermore, the Corps' interpretation of the Clean Water Act is not entitled to deference since

the policy did not emerge from its experience indicating that the assertion of such authority was necessary to effectuate the goals of the Act.

Finally, the Fourth Circuit has held that the Corps' migratory bird policy is invalid, while the Ninth Circuit has upheld this policy. This Court should resolve this split between the circuits.

ARGUMENT

The present case involves the issue left unresolved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985): whether the U.S. Army Corps of Engineers (the "Corps") has authority under the Clean Water Act (the "Act") to regulate isolated waters that are not adjacent to and have no hydrological or other connection to navigable waters.[1] In the case below, a divided panel of the Ninth Circuit held that the Corps' regulatory jurisdiction under the Act extends to isolated waters that are unconnected to other "waters of the United States," simply because such areas "may" be used by migratory birds. *See Leslie Salt Co. v. United States*, 896 F.2d 354, 355, 360 (9th Cir. 1990). Accordingly, this case tests the limits of federal authority under Section 404 of the Act, 33 U.S.C. § 1344.

Under Section 404, a person must obtain a permit from the Corps in order to discharge dredged or fill ma-

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[1] In *Riverside Bayview*, the Court held that the Corps' jurisdictional authority extended to the regulation of intrastate wetlands that are "adjacent" to other "waters of the United States." *Id.* at 131-39. The Court, however, expressly declined to rule on the validity of federal jurisdiction over the type of waters at issue here: intrastate, isolated waters (*i.e.*, waters that are neither navigable nor adjacent to navigable waters). *See id.* at 131 n.8 ("We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question").

terial into "navigable waters." The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* at § 1362(7). The Act does not define the phrase "waters of the United States"; instead, this phrase has been defined by the Corps and the U.S. Environmental Protection Agency ("EPA")[2] in identical regulations. The Corps' and EPA's regulatory definitions of "water of the United States" include, in relevant part, the following:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:
>
> > (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> >
> > (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

---

[2] The Corps has primary administrative responsibility for implementing Section 404 of the Act, including the initial review of permit applications in accordance with both its own regulations, *see* 33 C.F.R. Pts. 320-330 (1990), and EPA's regulations governing Section 404 permits. *See* 40 C.F.R. Pt. 230 (1990). EPA has authority to "veto" the Corps' permit decisions. *See* 33 U.S.C. § 1344(c).

33 C.F.R. § 328.3(a) (1990) (emphasis added). *See also* 40 C.F.R. § 230.3(s) (1990).

It is noteworthy that these regulations do not include use or potential use by migratory birds as a basis for asserting jurisdiction over isolated waters.[3] Notwithstanding this regulatory omission, the Ninth Circuit held that the Corps has jurisdiction over isolated waters simply because migratory birds "may" use these waters. *See Leslie Salt Co.*, 896 F.2d at 360.

I. THIS CASE WARRANTS SUPREME COURT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION IMPROPERLY EXPANDS THE CORPS' REGULATORY AUTHORITY TO VIRTUALLY ANY PROPERTY

Under the Ninth Circuit's reading of the geographic scope of the Corps' authority under Section 404, the Corps may regulate virtually any property.

In determining whether to assert jurisdiction over a parcel of land, the Corps employs a two-part test. First, it determines whether the area is a "water," and then whether it is jurisdictional because of its effect on interstate commerce. One category of "waters" is open bodies of water such as rivers, streams, and lakes. The Corps, however, has expanded this concept to include areas that rarely contain water at the surface. In *Leslie Salt*, for example, the "waters" at issue are small, man-made pits that pond at times during the winter rainy season. As the district court recognized, "[a]ny land subjected

[3] As discussed below, *see infra* at 12-14, the Corps did not develop the migratory bird policy until 1985 as a result of oversight hearings before a Senate subcommittee. After those hearings, the Corps issued an unpublished internal memorandum to its district offices directing them to assert jurisdiction over isolated waters on the basis of use or potential use by migratory birds. *See* Patrick J. Kelly, Brigadier General, Deputy Director of Civil Works, "EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters" (November 8, 1985) (copy lodged with Clerk's Office).

to enough temporary rainfall will collect water which stands until it runs off or percolates into the ground." *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 483 (N.D. Cal. 1989), *rev'd*, 896 F.2d 354 (9th Cir. 1990).

The other principal category of "waters" is "wetlands." *See* 33 C.F.R. §§ 328.3(a)(3); 328.3(b) (1990). Under the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," the criteria for identifying "wetlands" are so broad that the term includes areas with no discernible water for most of the year.[4] An area will be considered to be at wetland even if water is never present at the surface; it is sufficient if the underground water table rises to within 18 inches of the surface for as little as seven days during the growing season.[5]

When this expansive definition of "waters" is combined with the Corps' migratory bird policy, vast areas

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[4] The expansion of the Corps' jurisdiction since issuance of the Manual has been dramatic, particularly in coastal areas. For instance, the governor's office in Maryland has stated that the Manual has resulted in the regulation of "hundreds of thousands of areas not previously subject to federal jurisdiction." *See* Comments of David A.C. Carroll, Governor's Chesapeake Bay Coordinator (July 27, 1990), submitted to the Corps in response to notice in 55 Fed. Reg. 24138 (June 14, 1990) (copy lodged with Clerk's Office). The jurisdictional wetlands in one Maryland county have been estimated to have increased more than five-fold as a result of the Manual; indeed, some Maryland counties may now contain up to 65 percent wetlands under the Manual. *See* "Wetlands Preservation Law Draws Complaints in Md.," The Washington Post, February 20, 1990, p. A1. Similarly, under the Manual as much as 75 percent of Chatham County, Georgia qualifies as jurisdictional wetlands, representing an increase of over 50 percent. *See* Comments of Commissioners of Chatham County (July 25, 1990), submitted to the Corps in response to notice in 55 Fed. Reg. 24138 (June 14, 1990) (copy lodged with Clerk's Office).

[5] *See* F. Dunkle, Fish and Wildlife Service, R. Hammer, Environmental Protection Agency, R. Page, Department of Army, W. Scaling, Soil Conservation Service, Federal Manual for Identifying and Delineating Jurisdictional Wetlands §§ 2.8, 2.9 (January 1989).

of previously unregulated land are brought within Corps jurisdiction. Birds travel throughout the Western Hemisphere and may potentially use any land in the United States. In one study, for example, birds marked in North Dakota were recovered in 46 states, ten Canadian provinces and territories, and 23 other countries.[6] In addition, actual "use" by birds is not even required; potential use is sufficient. There is no minimum size requirement, nor does it matter whether birds use the site for nesting, feeding, or breeding, or simply as a place to fly over and land. Similarly, federal jurisdiction is exercised regardless of whether the use is regular and ongoing, or more limited, such as seasonal, temporary, or even a single incident of bird "use." Likewise, any bird will qualify—non-water dependent species such as robins, sparrows, and bluejays, are treated identically to waterfowl such as Canada geese and mallards. All that matters is that the bird happens to cross a state line.

The effect of the Ninth Circuit's decision is to enable the Corps to regulate minuscule depressional areas in the midst of, for example, upland corn fields, simply because the depressional areas collect water after rainfall or experience a "high" water table for a short time during the spring if the area could be used by birds.

The Foundation is aware of several instances in which the federal government has asserted jurisdiction over areas that are a mere fraction of an acre. For example, in *In the Matter of the Hoffman Group, Inc.*,[7] the government sought a $125,000 administrative penalty for an alleged filling of "waters of the United States," which included a 0.8-acre clay-lined depressional area located in a 40-acre

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[6] *See* U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 1 (1984).

[7] *See In the Matter of the Hoffman Group, Inc.*, CWA Appeal No. 89-2 (November 26, 1990), *notice of appeal filed*, (7th Cir. December 19, 1990) (copy lodged with Clerk's Office).

cornfield in Cook County, Illinois. The landowner appealed the administrative penalty, and, after a hearing, EPA's Chief Administrative Law Judge ("ALJ") determined that this tiny piece of land had no surface or groundwater connection with any other water body; it became wet after rain and dried through evaporation.[8] The ALJ also found that there was no evidence that migratory birds actually used the area, or that the area "contains any characteristic that would render it any more attractive to birds than any other land that at one time or another contains water." *Id.* at 48. Indeed, the ALJ noted that the government's expert had testified that birds would use any site: "I have seen ducks sitting in puddles in a parking lot." *Id.* at 48. Holding that the government had to establish more than the "theoretical possibility" that the area could be used by migratory birds, *id.* at 49, the ALJ rejected the government's assertion of jurisdiction over this area and reduced the penalty to $50,000.

The EPA regional office appealed this ruling to EPA's Chief Judicial Officer, claiming that "potential" use is sufficient for federal jurisdiction. EPA's Chief Judicial Officer agreed and reinstated $50,000 in penalties with respect to the 0.8-acre area that will filled. Although the Chief Judicial Officer accepted the ALJ's findings that this area had no relationship to other waters and that it was not actually used by migratory birds, the Chief Judicial Officer concluded that this area was a "water of the United States" because it "could" be used by migratory birds.[9]

As the Chief ALJ observed in *Hoffman*, if the isolated 0.8-acre depressional area is a jurisdictional "water of

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[8] *In the Matter of the Hoffman Group, Inc.*, Docket No. CWA-88-AO-24 at 45, 45 n.133 (September 15, 1989), *rev'd on other grounds*, CWA Appeal No. 89-2 (November 26, 1990) (copy lodged with Clerk's Office).

[9] *In the Matter of the Hoffman Group*, CWA Appeal No. 89-2 at 25 (November 26, 1990).

the United States," the decision "is tantamount to making all wetlands subject to Section 404 jurisdiction." [10] Without any minimum requirements as to size, type or frequency of use, or type of bird, the consequence of the Ninth Circuit's decision in *Leslie Salt* is to sweep countless isolated areas into federal jurisdiction regardless of their value in promoting water quality, their real effect on interstate commerce, or even their significance to migratory birds.[11]

II. THE NINTH CIRCUIT'S DECISION IS UNSUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT

A. The Migratory Bird Policy is Unrelated to the Act's Purpose of Protecting Water Quality

No one disputes that Congress intended to give the term "navigable waters" in the Act a broad interpretation. *See Riverside Bayview*, 474 U.S. at 132-39; S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972 at 327 (1973). This Court has stated:

> In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that

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[10] *Hoffman*, Docket No. CWA-88-AO-24 at 49.

[11] The Act provides no mechanism for direct judicial review of jurisdictional determinations. Such determinations are subject to review only after a landowner has endured the lengthy and expensive permit application process and a permit has been denied, or the landowner defies the Corps and risks an enforcement action and large administrative penalties (up to $25,000 per day). Because of the expense and risk of seeking review under either method and the low value of most small isolated waters, few property owners have the resources to challenge the assertion of jurisdiction over these areas, even though this issue is of great importance to property owners. Accordingly, this case is an appropriate vehicle for this Court to review this important jurisdictional question. We believe that this is a significant practical reason why the petition should be granted.

> had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.

Riverside Bayview, 474 U.S. at 133.

Congress' concern was that the legislative objective of the Act—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" [12]—could not be accomplished if the term "navigable waters" was restricted to its traditional meaning. The term "navigable waters" had historically been applied under the Commerce Clause to waters that serve as avenues of commerce. *See e.g., Utah v. United States*, 403 U.S. 9, 11 (1971).[13] While the traditional approach makes sense when the issue involves the shipment of goods, Congress recognized that it would be inadequate in protecting the Nation's water quality. With this goal in mind, Congress determined that the hydrological connection of

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[12] 33 U.S.C. § 1251(a).

[13] The legislative history cites a number of Supreme Court cases expanding the definition of navigable waters. *See* 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972 at 250 (1973). These cases are *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1871) (holding that a river was a navigable water because it was "navigable in fact" in its natural state and had the capacity to be used for interstate commerce); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-24 (1921) (a river having navigable capacity in its natural state but, as a result of various alterations and man-made obstructions was presently incapable of use for navigation is navigable); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940) (waters which are suitable for navigation by means of reasonable improvements are navigable). *See also Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-26 (1941) (Congress' authority extends to non-navigable tributaries of navigable waters). Simply because Congress sought to move beyond the definition of waters established in these cases, it does not follow that Congress intended to abandon the concept of navigability and regulate waters wholly unconnected to navigable waterways.

waters was of primary importance. As the Senate Committee on Public Works stated:

> Through narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof and their tributaries.

Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 at 1495 (1973). To the extent it is discernible, the congressional goal was to regulate water linked in the hydrological chain to navigable waters. Insofar as a "water" or "wetland" is isolated from the interconnected system, it will not affect the water quality of the system, and therefore its regulation is unrelated to the Acts purpose.

B. The Corps' Interpretation of the Act is Not Entitled to the Deference Typically Accorded to an Agency's Interpretation of a Statute

We recognize the general principle that courts should grant deference to an agency's construction of the statute it is entrusted to administer. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Courts typically give weight to an agency's statutory interpretation where, for example, the policy is formulated and justified in a "detailed and reasoned fashion," *id.* at 865, is announced contemporaneously with the enactment of the statute, *see Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181, 216 (1985) (White, J., concurring), or has been interpreted in a consistent and longstanding manner. *See Bowen v. American Hospital Ass'n*, 476 U.S. 610, 646 n.34 (1986).

The migratory bird policy was not adopted until 1985, thirteen years after the enactment of the Federal Water Pollution Control Act Amendments of 1972, when the original debate over the reach of "waters of the United States" took place, and eight years after the Act's revision in 1977, when the jurisdictional issue was revisited by Congress.[14] The issue was first raised by one Senator during oversight hearings before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works. Seeking to extend federal regulation under the Act, Senator Mitchell asked the Acting Assistant Secretary of the Army, Civil Works, whether Corps jurisdiction under Section 404 reached isolated wetlands "used by migratory fowl, waterfowl, which establishes the interstate commerce basis for jurisdiction." [15] The witness declined to respond, stating that he needed legal advice prior to answering this question.[16] One month later, EPA's Acting Assistant Administrator

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[14] The Corps initially applied a narrow definition of the term "navigable waters" after the enactment of the Federal Water Pollution Control Act of 1972, but a federal court ordered the Corps to promulgate new regulations. *See Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). As a result, the Corps promulgated interim final regulations that expanded the definition of navigable waters to include traditional navigable waters and their non-navigable tributaries, coastal wetlands, interstate waters, inland wetlands adjacent to navigable waters, and intrastate waters utilized in interstate commerce for recreational, fishing, industrial, or agricultural purposes. *See* 40 Fed. Reg. 31320, 31324 (July 25, 1975). This definition was codified at the time at 33 C.F.R. § 209.120(d)(2).

[15] Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. 115 (June 10, 1985) (statement of Sen. Mitchell).

[16] *Id.* It seems reasonable to conclude that if the migratory bird policy had already emerged as a reasoned outgrowth of the Corps' administration of the Act, the Army's highest officer in charge of the Corps' regulatory policies would have been able to answer this question at the hearing.

for External Affairs appeared before the same panel. Apparently prepared for the Senator's question, the Assistant Administrator listed several examples of effects on interstate commerce that would subject waters to regulation under the Act, including waters used as habitat by birds protected by Migratory Bird Treaties and waters used as habitat by other migratory birds which cross state lines.[17] Senator Mitchell questioned the witness' failure to include waters that "could be" used by migratory birds. *Id.* at 169-70. The Assistant Administrator then indicated a need to confer with counsel prior to answering this question.

Eight weeks later EPA gave the Senator the answer he wanted. In a legal memorandum, EPA General Counsel Francis S. Blake stated that "if the evidence reasonably shows that the waters 'are used or would be used' by migratory birds or endangered species, it is covered by EPA's regulation." [18] The Corps circulated this memorandum to its district offices, and the migratory bird policy came to life.[19]

Significantly, at the time the Corps was embracing the Senator's position, it was consolidating its various permitting regulations pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553. Although

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[17] *See* Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. 163 (July 15, 1985).

[18] EPA Memorandum from Francis S. Blake, General Counsel, to Richard E. Sanderson, Acting Assistant Administrator of the Office of External Affairs, "Clean Water Act Jurisdiction over Isolated Waters" at 3 (September 12, 1985) (copy lodged with Clerk's Office).

[19] Patrick J. Kelly, Brigadier General, Deputy Director of Civil Works, "EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters" (November 8, 1985) (copy lodged with Clerk's Office).

one of the regulatory provisions under review was the definition of "waters of the United States," the Corps did not revise its definition to incorporate the new migratory bird policy. 51 Fed. Reg. 41206, 41250 (November 13, 1986) (*codified at* 33 C.F.R. § 328.3(a)).[20]

As this background demonstrates, the Corps did not have a "detailed and reasoned" justification that such broad jurisdiction is needed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Similarly, the migratory bird policy was not enunciated contemporaneously with the enactment of the Act, and the interpretation has not been applied in a consistent and longstanding manner. Instead, the policy appears to be the result of pressure by a single Senator. In the absence of clear congressional authorization or a demonstrated justification that such jurisdiction is needed to attain the purposes of the Act, the Corps' migratory bird policy is not entitled to deference by this Court.

III. SUPREME COURT GUIDANCE IS REQUIRED TO RESOLVE THIS IMPORTANT ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS

The migratory bird policy has also divided the two Courts of Appeals that have reviewed this issue. As stated above, the Ninth Circuit held that the Corps may assert jurisdiction over isolated waters since they are encompassed within the regulatory definition of "other waters," because migratory birds use or could use these properties. *See Leslie Salt*, 896 F.2d at 360. Over one year ago, however, the Fourth Circuit invalidated the Corps' assertion of jurisdiction over isolated wetlands on

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[20] The preamble to the regulations, which has no legal authority, noted, however, that "EPA has clarified that waters of the United States" also includes waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" and "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Id.* at 41217.

the basis that they could be used by migratory birds. *See Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (Table), 20 Env. L. Rep. (Env. L. Inst.) 20008 (4th Cir. 1989) (per curiam). In that case, the Fourth Circuit determined that the Corps' migratory bird policy was announced in violation of the notice and comment provisions of the Administrative Procedure Act.[21]

This split among the courts of appeals has resulted in a lack of uniformity in implementing the geographic reach of Section 404 of the Act to isolated waters. In response to the Fourth Circuit's *Tabb Lakes* decision, the Corps and EPA issued a directive to their field offices stating that they would not apply the migratory bird policy in the Fourth Circuit (*i.e.*, the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland), but would continue to apply this policy outside these states.[22] This differing application of the reach of Section 404 lacks any legal or equitable basis, and warrants resolution by the Supreme Court.[23]

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[21] The Ninth Circuit in *Leslie Salt* did not address the procedural issue raised by the Fourth Circuit in *Tabb Lakes*. Thus, we have focused on the substantive issues raised by the migratory bird rule. As the Fourth Circuit held in *Tabb Lakes*, however, we note that the Corps' failure to promulgate this rule in accordance with public notice and comment constitutes a violation of the Administrative Procedure Act and is an independent basis for reversing the decision of the court below.

[22] John P. Elmore, Directorate of Civil Works, and David G. Davis, Director of Office of Wetlands Protection, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" (January 24, 1990), Petition for a Writ of Certiorari of Petitioners, Appendix E at A-46.

[23] The Corps also stated in this memorandum that the Corps and EPA "intend to undertake as soon as possible an [Administrative Procedure Act] rulemaking process regarding jurisdiction over isolated waters." *Id.* at ¶ 2, Petition for a Writ of Certiorari of Petitioners, Appendix E at A-48. More than 20 months after *Tabb Lakes* and one year after issuance of this memorandum, however, the Corps and the EPA have not initiated rulemaking on this issue.

CONCLUSION

This Court should grant the petition and clarify the extent of federal jurisdiction under the Act. The issue raised by this case affects property owners throughout the United States. If the decision of the Ninth Circuit is left to stand, the Corps can exercise jurisdiction over virtually any isolated "wet" area on the premise that it "could" be used by migratory birds. This result is unsupported by the legislative history of the Act, and is in conflict with another federal appellate decision. For these reasons, the Supreme Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 90-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.
Petitioners,

v.

UNITED STATES, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FOREST COUNCIL, THE AMERICAN PAPER INSTITUTE, THE CHEMICAL MANUFACTURERS ASSOCIATION AND THE NATIONAL FOREST PRODUCTS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FOREST COUNCIL, THE AMERICAN PAPER INSTITUTE, THE CHEMICAL MANUFACTURERS ASSOCIATION, AND THE NATIONAL FOREST PRODUCTS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Paper Institute, Inc. is a non-profit trade association whose members include companies which account for approximately 90 percent of the domestic manufacture of pulp, paper, and paperboard. *Amici curiae* the American Forest Council and the National Forest Products Association

are non-profit organizations whose members include individual companies and other trade associations accounting for much of the timber managed and most of the timber harvested in this country, as well as most of the solid wood products manufactured. *Amicus curiae* the Chemical Manufacturers Association is a non-profit trade association whose members represent 90 percent of the productive capacity for basic industrial chemicals in this country. The *amici* therefore have a vital interest in the regulation of "waters of the United States," as applied to temporarily wet areas that may be present on land owned or used by such companies and as applied to surface impoundments used in manufacturing and forestry.

In reversing the district court, the Ninth Circuit held that the federal Clean Water Act authorizes the U.S. Army Corps of Engineers to regulate dredging and filling activities in "other waters," which are not connected in any way to or adjacent to traditional navigable or interstate waters, so long as their "use, degradation or destruction could affect interstate or foreign commerce." It did not matter if the "other waters" are man-made, nor even if they become wet only temporarily due to rainfall and are "in fact dry most of the year." The Ninth Circuit then found that the requisite connection to interstate commerce for these isolated "other waters" would be established if they "may provide habitat to migratory birds and endangered species."

The *amici* represent companies which own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. In addition, these companies rely on timber from the over

250 million acres of private, nonindustrial forest land. These lands undoubtedly contain many isolated areas where topographical depressions occasionally collect rainfall runoff. The *amici* also represent companies which own and operate hundreds of man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

If every such surface impoundment and every isolated, low-lying area were considered "waters of the United States" subject to regulation under the Clean Water Act merely because they have the potential to be used by migratory birds or endangered species, then these companies could find that their intended use of their lands and the continued operation of their man-made impoundments would be constrained by Corps of Engineers and U.S. Environmental Protection Agency permit requirements.[1]

Thus, the *amici* have a direct and immediate interest in the issues presented in this case, which concern fundamental aspects of how the activities of their member companies may be subject to federal regulation. Moreover, since the Ninth Circuit's definition of "waters of the United States" is so broad and so vague that it could apply to almost any property, almost any of the *amici*'s members (and countless other landowners) could be subjected to harsh civil or

[1] While this case concerns Corps of Engineers regulations under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, the extent of "waters of the United States" also dictates U.S. Environmental Protection Agency jurisdiction to require permits for discharges to such waters under Clean Water Act Section 402, 33 U.S.C. § 1342.

criminal penalties if the government chooses to assert that the member's particular property and activity fall under Clean Water Act jurisdiction.

Amici therefore can help provide this Court with a much broader perspective on the pernicious effects which the Ninth Circuit's overextension of Clean Water Act jurisdiction could have on manufacturing and forestry activities throughout the United States.[2]

ARGUMENT

I. THIS COURT'S GUIDANCE IS NEEDED TO DELINEATE THE SCOPE OF CRITICAL AND FAR-REACHING FEDERAL WATER POLLUTION LEGISLATION

This case concerns the central issue in determining the applicability of virtually all of the regulatory controls imposed by the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* If an area is considered to be a "navigable water," defined to mean a "water of the United States" in CWA Section 502(7), 33 U.S.C. § 1362(7), then the U.S. Army Corps of Engineers (the "Corps") has authority to restrict or prohibit the discharge of dredged or fill materials into that area, under CWA Section 404, 33 U.S.C. § 1344. In a terse analysis of the Corps regulations defining "waters of the United States," the Ninth Circuit concluded that Petitioners' normally dry salt crystallizers and calcium chloride pits are "other waters" under the Corps regulations; that such isolated areas, which are neither adjacent to nor hydrologically connected with other surface waters, are

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[2] Pursuant to Rule 37 of the Rules this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court.

subject to Clean Water Act jurisdiction; and that mere use (or potential use) by migratory birds or endangered species is sufficient justification under the Commerce Clause to authorize such expansive federal jurisdiction. 896 F.2d at 360, Pet. App. at A-11 to A-12.

On the threshold question of whether wholly isolated "waters" fairly come within the meaning of "waters of the United States," the issue which this Court expressly reserved in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. at 131 n.8 (1985), the Ninth Circuit implicitly concluded that they do, without any reference to legislative history or to any judicial decision involving a wetland or "other water" with no connection to navigable-in-fact waters.[3] The Ninth Circuit then removed essentially any limitation

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[3] Congress intended to control not only discharges into traditional navigable waters, but also any other discharges into areas that might affect those waters (such as adjacent wetlands). *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. at 132-33, 135-38. There is nothing in the objectives of CWA § 101(a), 33 U.S.C. § 1251(a), however, nor in the legislative history of the CWA, that suggests Congress intended to address areas which only occasionally collect water (or man-made excavations), if those areas have no potential impact upon traditional navigable waters or even on any other surface water body. Rather, the legislative history demonstrates that Congress was concerned about waters with some connection to and potential impact upon other surface waters. In discussing the geographic scope of the Clean Water Act, Congress spoke of a need to control the discharge of pollutants at its source because "water moves in hydrologic cycles," S. Rep. No. 92-414, p. 77 (1972), and because "[t]he once seemingly separable types of aquatic systems" are now known to be "interrelated and interdependent." 123 Cong. Rec. 26718 (August 4, 1977) (statement of Sen. Baker).

on the breadth of Corps permitting jurisdiction by concluding that any use (or apparently even potential for use) by migratory birds or endangered species is sufficient to bring an isolated "other water" within the reach of federal jurisdiction under the Commerce Clause.[4] The effect of these Ninth Circuit rulings is that Clean Water Act permitting requirements could be applied to vast additional areas of the country, and potentially regulated companies and individuals have only vague guidance as to whether they are subject to the Act.

A. Identification as a "Water of the United States" Triggers Extensive Permitting Requirements

Under CWA Section 404, 33 U.S.C. § 1344, a Corps permit is required in most instances prior to discharging dredged or fill materials into a "water of the United States." Under the Corps regulations, this means that a permit may be required for dredging of the area (unless it requires only *de minimis*, incidental soil movement), construction of roads, installation of intake or outfall pipes or buried utility

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[4] There is nothing in the record to suggest that any use of an area by migratory birds or endangered species, no matter how insignificant, has a substantial impact on interstate commerce. The mere potential for such use is even further removed. Nor is there any reason to believe that areas which only collect water after heavy rainfall, or artificial ponds that are used for industrial or commercial activity, would be expected to have a substantial effect on migratory birds or endangered species, in any event. As Chief Justice Rehnquist observed in a concurring opinion in *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), "it has long been established that the commerce power does not reach activity which merely 'affects' interstate commerce. There must instead be a showing that regulated activity has a *substantial effect* on that commerce." *Id.* at 312 (emphasis in original).

lines, or even mechanically clearing the land. *See* 33 C.F.R. §§ 323.2-323.4 (1990) and, *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 473 F. Supp. 525 (W.D. La. 1979). Various forestry or farming practices may involve activities which, if conducted on land considered to be "waters," would constitute the discharge of dredged or fill material, particularly during road construction, harvesting, and replanting.[5]

The effect of a broad definition of "waters of the United States" extends even further, however. Under CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, a permit is required for any "discharge of a pollutant," which in turn is defined as "any addition of any pollutant to navigable waters from a point source." CWA § 502(12), 33 U.S.C. § 1362(12). As noted above, for purpose of the Act, CWA § 502(7) defines "navigable waters" to be "waters of the United States." The regulatory definition of "waters of the United States" promulgated by the U.S. Environmental Protection Agency ("EPA") is virtually identical to the Corps' definition of the same term which was applied by the Ninth Circuit in the case below. *Cf.* 40 C.F.R. § 122.2 (1990) *with* 33 C.F.R. § 328.3(a) (1990). Thus, an area determined to be a "water of the United States" is not only subject to Corps permitting requirements for any discharge of dredged or fill material but also is subject to EPA

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[5] Although CWA § 404(f)(1), 33 U.S.C. § 1344(f)(1), contains exemptions from Corps permitting requirements for certain forestry ("silviculture") or farming activities conducted in accordance with statutory criteria, those exemptions are limited by their terms and by CWA § 404(f)(2). The Corps has issued regulations (33 C.F.R. § 323.4 (1990)) and additional guidance describing when the exemptions will be available.

CWA Section 402 discharge permit requirements for any point source discharge of "pollutants" to the area.[6]

B. The Ninth Circuit's Interpretation of "Waters of the United States" Encompasses Vast Areas of Normally Dry Land

The definition of "waters of the United States" advanced by the Corps and accepted by the Ninth Circuit in the case below is so broad that it could be used to impose these Corps and EPA permitting requirements on the use of practically any land. The salt crystallizers at issue in the instant case were located in an area that had been pasture land in the past, 896 F.2d at 355, Pet. App. at A-2, and were "constructed on dry land." 700 F. Supp. at 480, Pet. App. at A-21. The district court made a factual finding that the property is not "inundated or saturated," and certainly not "at a frequency and duration" sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. *Id.* at 487, Pet. App. at A-35.

The district court clearly rejected the Corps' assertion that the former salt crystallizers constituted "other waters" or "wetlands" because of occasional "ponding of water on otherwise dry land." *Id.* at 485, Pet. App. at A-32. "After a rain that is heavy or long enough, any soil will become temporarily saturated. . . . [I]t is simply not enough that rain water collect on property for a few days for that property to become a water of the United States." *Id.* at 487,

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[6] "Pollutant" is defined very broadly in CWA § 502(6), 33 U.S.C. § 1362(6), encompassing a wide range of both process and non-process water discharges.

Pet. App. at A-35. Yet the Ninth Circuit concluded that the district court's findings were irrelevant for a determination of the Corps' jurisdiction over "waters of the United States." 896 F.2d at 360, Pet. App. at A-11.

Thus, under the Ninth Circuit's construction, mere ponding of rainfall on otherwise dry land *is* sufficient to transform that land to a "water" that may be subject to Corps jurisdiction under Clean Water Act jurisdiction.[7] By removing any requirement that a "water" be naturally occurring, be adjacent to or connected with a navigable-in-fact surface water, or even be wet for more than a short time, the Corps, now with the Ninth Circuit's blessing, has essentially removed any limitation that the term "water" places on Corps jurisdiction.

There is no reason to believe that Congress intended Clean Water Act jurisdiction to extend to the vast areas of the country where water may pond or soils may be saturated temporarily after rainfall or snowmelt on normally dry ground. Even if it did, however, the Constitution would still require some connection to interstate commerce to authorize such action by Congress. Apparently recognizing that some connection with interstate commerce was a necessity for its definition of "waters of the United States" to survive Constitutional scrutiny, the Corps included a requirement that an isolated "other water," to be

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[7] *See also Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, January 1989, published by the Corps, EPA, the Fish and Wildlife Service, and the Soil Conservation Service, which suggests that an area where ponding or saturation occurs for as little as one week may be considered a "wetland." *Id.* at 6-7.

subject to Corps jurisdiction, must be such that its use, degradation, or destruction "could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1990).

The Corps' interpretation at issue in this case, however, that an isolated "other water" has sufficient contacts with interstate commerce if it is "or would be" used as "habitat" by migratory birds or by an endangered species, 51 Fed. Reg. 41,206, 41,217 (1986), is so broad that in practice it represents no limitation at all on Corps jurisdiction, encompassing virtually all "waters" within the class of "waters of the United States" with sufficient ties to interstate commerce. The Corps' regulations do not even require that migratory *waterfowl*, or an endangered species with a *water-based* habitat, use the site; in fact, the Corps has asserted jurisdiction over property because of its use by woodpeckers and songbirds. *See Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (Table), (reported at 20 Envtl. L. Rep. 20008). This Court can take judicial notice of the fact that birds such as woodpeckers and songbirds could make use of practically any undeveloped property, regardless of whether any significant ponding of water occurs there. Moreover, the Corps' interpretation and the Ninth Circuit's opinion do not even require that an area actually be used by migratory birds or endangered species, but only that an area "*may* provide habitat to migratory birds and endangered species." 896 F.2d at 360, Pet. App. at A-12 (emphasis added).[8] It is

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[8] In fact, the Corps has already asserted that their jurisdiction can be founded on such a speculative basis. *See, e.g., Leslie Salt*

difficult to imagine an area of land that could not be considered "waters of the United States" under this expansive definition.[9]

C. The Ninth Circuit's Interpretation of "Waters of the United States" Would Affect the Use of Private, Artificial Ponds and Impoundments

Since the Ninth Circuit would apply CWA permitting requirements to man-made waters created by excavating dry land, 896 F.2d at 359-60, Pet. App. at A-9 to A-11, its conclusion that use or potential use by migratory birds provides sufficient connection to interstate commerce affects the utilization of countless man-made surface impoundments. This expansive jurisdiction would include thousands of ponds and conveyances created for commercial or industrial

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Co. v. *United States*, 700 F. Supp. at 485, Pet. App. at A-31 ("The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use."); *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. at 728 (Corps directive that "all waterbodies which are *or reasonably could be* used by migratory birds are waters of the United States" (emphasis added)).

[9] It is unclear whether the Ninth Circuit really meant that an area which merely "may provide habitat" has a sufficient connection to interstate commerce, since the Ninth Circuit made a finding that migratory birds and one endangered species "may have used the property as habitat," yet nevertheless remanded to the district court "to determine if the property has the requisite connections to interstate commerce." 896 F.2d at 360, Pet. App. at A-12. Even if the Ninth Circuit meant to imply some requirement that the significance of use or potential use be demonstrated, that would present such an entirely vague and subjective criterion for application of Clean Water Act permit requirements as to be unconstitutionally vague. *See* pp. 14-16 *infra*.

purposes (*e.g.*, raw (intake) water settling and treatment ponds; process water evaporation ponds, similar to Petitioners' salt crystallizers; log storage ponds used in the manufacture of pulp, lumber, or solid wood products; ponds constructed for storage of fire protection water or process water; or settling ponds used to control rainwater runoff from mining, construction, commercial, and similar activities) and numerous other man-made bodies of water, with no connection to natural surface waters.

Since most such surface impoundments have at least the potential to be used in some way by migratory birds, Corps permit requirements would apply to dredging of such impoundments or construction within such impoundments, which activities are frequently necessary for their effective use. Moreover, EPA wastewater discharge permitting requirements under Clean Water Act Section 402, 33 U.S.C. § 1342, would presumably apply to any point source discharge of "pollutants" *into* such ponds.[10]

The Corps may argue that many of these types of artificial waters will not be affected, since the Corps has excluded certain "artificial lakes or ponds" under 33 C.F.R. § 323.3(b) (1990). This exemption is so

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[10] The administrative burden of having to obtain Corps or EPA permits for activities affecting the use of private, man-made surface impoundments which are neither tributary to nor adjacent to any other surface waters would be tremendous, but it would likely be overshadowed by the cost of complying with substantive requirements imposed in those permits (such as the "Best Available Technology" requirement for wastewater discharges under CWA Section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A)).

limited, however, that it is little comfort to a potentially regulated plant manager or landowner.[11]

First, the exemption is in practice quite narrow. The Corps and the Ninth Circuit have asserted that this exemption would only apply to artificially created waters "which are currently being used for commercial purposes." 896 F.2d at 360, Pet. App. at A-10. Second, the Corps asserts the right "on a case-by-case basis to determine that a particular water body within these categories" of artificially created waters *is* a "water of the United States." *Id.* at 359-60, Pet. App. at A-10.[12] Finally, since the exclusion only applies to "excavating and/or diking dry land" 33 C.F.R. § 323.3(b) (1990), and since virtually every area which collected rainwater even temporarily may be considered by the Corps to have been "a water of the United States" even prior to excavation or diking, in many cases the Corps could assert that an artificially created surface impoundment was not created on dry land but was created in a "water of the United States."[13]

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[11] Moreover, EPA regulations defining "waters of the United States" for CWA § 402 permitting purposes exclude only certain "waste treatment systems" which are "designed to meet the requirements of CWA"; they contain no exclusion for other types of ponds. *See* 40 C.F.R. § 122.2 (1990).

[12] Similarly, EPA has argued that its "treatment pond exception is simply notice to polluters that it will not generally regulate" discharges into waste treatment ponds, "not a promise that it never will." *Texas Municipal Power Agency* v. *EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988).

[13] The Corps might also argue that the exclusion in 33 C.F.R. § 328.3(a) (1990) for "waste treatment systems,. . . designed to meet the requirements of CWA" could mitigate some of these

D. The Ninth Circuit Has Provided an Impermissibly Vague Standard for Assessing Harsh Civil and Criminal Penalties

While the cost and regulatory burden imposed by the Corps' and the Ninth Circuit's expansive definition of "waters of the United States" represents a tremendous potential impact on *amici* and other businesses, municipalities, and private citizens, the impact is greatly magnified by the harsh civil and criminal penalties available under the Clean Water Act. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides for a civil penalty of up to $25,000 per day for a violation of the prohibition on unpermitted discharges, while CWA Section 309(c), 33 U.S.C. § 1319(c), could impose a criminal penalty of up to $25,000 per day of violation or imprisonment for not more than one year, or both, for even negligent violations.

The United States has been vigorously prosecuting companies and individuals for placing fill material in areas which the government considers wetlands or other "waters of the United States." In fact, this Court recently denied a petition for *certiorari* in a case where an individual was sentenced to three years

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concerns. That exemption was not an issue for Leslie Salt's salt crystallizers and calcium chloride pits, however, and it does not apply to thousands of man-made impoundments used for purposes other than "waste treatment." Moreover, that exemption, like that for "artificial lakes or ponds," may be severely limited by claims that the waste treatment system is located in an area that previously fell within the Corps' expansive definition of "waters of the United States." (EPA has recently argued that such a limitation is implied in its similar definition of "waters of United States" at 40 C.F.R. § 122.2 (1990). *See West Virginia Coal Ass'n* v. *Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989) (appeal pending).)

imprisonment and fined $200,000 for filling a wetlands without a permit. *U.S.* v. *Pozsgai*, Cr. No. 88-00450-01, (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied*, 111 S. Ct. 48 (1990).[14]

The companies and landowners faced with these severe potential penalties, however, have been provided few, if any, objective criteria by which to determine whether the use of their land requires a Corps or EPA permit. It does not matter that an area is only temporarily wet after periods of heavy rainfall, nor that an excavation is artificially created with no connection to other waters. It may be enough that the area merely has the *potential* to be used by migratory birds or endangered species, or there may be some undefined level of actual use required.[15] Such a nebulous and subjective standard for determining the applicability of stringent civil and criminal penalties must be unconstitutionally vague. *See, e.g., Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926) (statute which "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates

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[14] *See also, e.g., U.S.* v. *Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company fined $100,000 and its senior vice-president fined $10,000 and given a suspended six-month sentence with one year probation for filling in wetlands without a permit); Kamenar, *Environmental Protection or Enforcement Overkill?*, 7 Envtl. F. 29-31 (1990); *Trading Whiz Fined for Wetland Damage; $2 Million Md. Judgment May Be Record Against an Individual*, Washington Post, May 26, 1990, at A1.

[15] In fact, a dissenting opinion in the Fourth Circuit *Tabb Lakes* decision suggests that use by ducks and geese may be enough, but that use by robins and finches may not. 20 Envtl. L. Rep. 20008 at n.2 (4th Cir. 1989).

the first essential of due process law."); *Kolender* v. *Lawson*, 461 U.S. 352 (1983) (statute is unconstitutionally vague because it fails to describe with particularity what is required, encouraging arbitrary and discriminatory enforcement).

II. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH A DECISION OF THE FOURTH CIRCUIT

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court described a two-part analysis to be used in determining whether the Corps may require a permit for placement of fill material on property. First, it must be determined whether the property falls within the applicable regulation; then, if it does, the court must assess whether the statute provides the Corps with authority to regulate discharges into such an area. *Id.* at 126, 129-30.

The district court in *Tabb Lakes* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), as affirmed by the Fourth Circuit, 885 F.2d 886 (1989) (Table) (reported at 20 Envtl. L. Rep. 20008), looked to the Corps regulations defining "waters of the United States" and determined that those regulations do not include isolated waters which are or may be used by migratory birds or endangered species. The Corps would have to comply with informal rulemaking procedures under the Administrative Procedure Act, 5 U.S.C. § 553, if the Corps wished to attempt to expand its jurisdiction to cover such "waters."[16]

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[16] While not reaching the issue, the district court also expressed "grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction . . . ." 715 F. Supp. at 729.

The Ninth Circuit, on the other hand, concluded that "[t]he Corps has adopted" actual or potential use by migratory birds and endangered species as a criterion for determining its jurisdiction over "other waters." 896 F.2d at 360, Pet. App. at A-11. Thus, under the two-part analysis laid out in *United States* v. *Riverside Bayview Homes*, the Ninth Circuit made the threshold determination that the Corps' regulations *do* include "other waters" whose only connection with interstate commerce is use or potential use by migratory birds and endangered species, while the Fourth Circuit reached exactly the opposite conclusion. The situation demonstrated by Appendix E to Petitioners' brief, where the Corps and EPA follow one definition of "waters of the United States" in the Fourth Circuit and a different definition in other circuits, must not be allowed to continue.

CONCLUSION

The Corps of Engineers' assertion that "waters of the United States" includes isolated lands which are subject to only occasional saturation or ponding, or artificial ponds created on normally dry land, solely because those areas are or could be used by migratory birds or endangered species, is so broad as to subject vast additional areas of this country to Corps (and EPA) permitting requirements. The Corps and the Ninth Circuit have adopted an impermissibly vague and subjective standard for the crucial determination of whether Clean Water Act restrictions apply. Moreover, that nebulous standard directly conflicts with a

decision of the Fourth Circuit. This Court's guidance is urgently needed to clarify the extent of federal jurisdiction under the Clean Water Act.

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No. 90-792

In The

Supreme Court of the United States

October Term, 1990

LESLIE SALT CO. and CARGILL, INC.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and the National Cattlemen's Association (NCA) respectfully submit this brief amicus curiae in support of petitioners, Leslie Salt Company and Cargill, Inc. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

NCA is a nonprofit, tax-exempt corporation representing over 230,000 members nationwide. Many NCA members own land potentially subject to the regulatory power of the Army Corps of Engineers (Corps) under the theory of the court below. The disposition of this case will have a direct impact on the rights of those members.

The opinion below holds that the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, authorizes the Corps to exercise regulatory jurisdiction over temporary rainwater puddles. Amici believe that the ruling below is incorrect and will severely impact private property rights. Congress granted broad powers under the Clean Water Act to protect the nation's waters from pollution. However, Congress did not intend that the Corps regulate land, dry most of the year and hydrologically unconnected to open water, solely because migratory birds might use the land as habitat. Further, Congress' constitutional power to regulate interstate commerce does not authorize regulation of private land on such tenuous grounds. The public interest strongly supports limiting agency power to that granted by Congress and the Constitution.

STATEMENT OF THE CASE

This case involves the geographical limits of the Corps' regulatory jurisdiction under the Clean Water Act

(CWA or the Act). 33 U.S.C. § 1251, *et seq.*[1] Congress enacted the Clean Water Act for the purpose of improving water quality, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Pursuant to this goal, Section 404(a) of the Act authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Act defines navigable waters as "waters of the United States including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7). Thus, the statutory language "navigable waters" and "waters of the United States" define the geographical limits of Corps regulatory jurisdiction.

In this case, Leslie Salt Company owns 143 acres of land partially containing former crystallizers and calcium chloride pits once used in the salt manufacturing process. These artificially created pits temporarily hold rainwater during the winter rainy season. *See* Petitioners' Appendix at A-2.

The court below held that Corps regulatory jurisdiction over "waters of the United States" extends to these former crystallizers and calcium chloride pits. The opinion below concluded that the Corps properly asserted authority over the property as a "water" of the United States because migratory birds or an endangered species might use the property as habitat. *Id.* at A-12. This potential habitat theory, the court below reasons, is a valid interpretation of the Clean Water Act and authorizes regulation of temporarily wet, artificially created low areas as "waters of the United States."

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[1] CWA's predecessor was the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 86 Stat. 616. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

The Corps regulation at issue in this case is the "other waters" provision which defines "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1989). The Corps interprets the regulation to extend to any waters "[w]hich are or would be" used as habitat by migratory birds which cross state lines or as habitat for endangered species. 51 Fed. Reg. 41,206, 41,217 (1986). The court below determined that the potential habitat connection is a sufficient connection to interstate commerce for the purposes of satisfying the regulation and establishing congressional authority under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3. *See* Petitioners' Appendix A-11 and A-12.

As a whole, the "other waters" subsection of Section 328.3 is called the "isolated" waters and wetlands provision because these "other waters" are physically unconnected with other waters of the United States. *See* Petitioners' Appendix at A-31. The issue presented for this Court's resolution is whether the Clean Water Act grants the Corps regulatory power over isolated waters and wetlands, even temporary puddles, solely because wildlife might use the property as habitat. This Court specifically reserved the question of Corps authority over isolated waters and wetlands in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 131 n.8 (1985). Additionally, if Congress did go this far, the question presented raises the issue of whether regulating private

property to protect habitat for migratory birds or endangered species violates Congress' constitutional power under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I

WHETHER THE CORPS MAY REGULATE ISOLATED WATERS AND WETLANDS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

The court below sanctions the Corps' radical expansion of territorial jurisdiction under Clean Water Act § 404. Accordingly, navigable waters has come to mean an isolated puddle theoretically suitable as a resting place for any bird crossing state lines. This potential habitat theory of jurisdiction brings millions of acres of private land within federal control without regard to clean water. In short, the Corps has abandoned the Act's water quality goals and transformed Section 404 into a national land planning and zoning law to protect open space.[2]

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[2] *See* William L. Want, *Law of Wetlands Regulation* vii (1990), stating in reference to the Corps' regulatory program under the

(Continued on following page)

The Corps' expanding territorial limits cause dangerous uncertainty to landowners. Few of them could ever imagine that engaging in a simple productive activity on their own land, such as the ditch digging in this case, would require a permit from the federal government. Even fewer private property owners can afford the time (over five years in this case) or money to challenge agency jurisdiction and, thus, make a "federal case" out of a ditch digging or grading permit. In short, most affected property owners apply for a permit in the first instance, or after being notified by the Corps that the Act authorizes severe civil penalties and jail time for Section 404 violations.[3]

On paper, being subjected to Corps regulatory jurisdiction means having to apply for a permit before going forward with the project. In practice, the Corps uses the permitting program to expand the habitat protection zoning scheme read into the Act by administrative fiat. This overzealous regulatory expansion denies private property owners the reasonable use of their land without any improvement in water quality. Therefore, this Court's intervention is sorely needed to clarify whether private lands containing isolated waters and wetlands are subject to Corps permitting authority.

Clean Water Act, "[t]here is no other federal law that can be applied so much like a local zoning law, whereby local and national interest groups can, on general public interest and environmental grounds, decide the fate of major proposed developments. In a real sense, wetlands law can be considered a national zoning law."

[3] *See, e.g.*, CWA § 309(c)(1)(A), 33 U.S.C. § 1319(c)(1)(A) (first offense of negligently discharging fill into waters of the United States is punishable by up to $25,000 per day of violation and one year imprisonment).

A. The Corps Has Radically Expanded the Territorial Scope of Its Section 404 Permit Authority

Section 404's regulatory history demonstrates the radical expansion of power by the Corps. Initially, the Corps limited its regulatory power to waters meeting a strict test of navigability. *See Riverside*, 474 U.S. at 123. Next, the Corps asserted jurisdiction over coastal and freshwater wetlands based on periodic inundation by adjacent open water. *See id.* at 124. Then, the Corps replaced the periodic inundation requirement and asserted power over any wetland "inundated or saturated by surface or groundwater." *See id.* This step severed the connection to open water, thus beginning the Corps' regulation over isolated waters and wetlands.[4] The sole limitation on the territorial jurisdiction was a requirement that degradation of the waters or wetlands must affect interstate commerce such as recreational travelers, fishing commerce, or industrial commerce. 33 C.F.R. § 328.3(a)(3). Finally, the Corps adopted the final blow, asserting jurisdiction over any waters "[w]hich are or would be used" as habitat by migratory birds, or habitat for endangered species. 51 Fed. Reg. at 41,217.[5]

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[4] In *Riverside*, this Court approved the Corps' regulation of wetlands only so far as it applied to wetlands adjacent to open waters, and specifically reserved the question of whether the Act reached isolated waters. 474 U.S. at 124 n.2, 131 n.8.

[5] The Corps adopted this potential habitat theory of territorial jurisdiction without notice and opportunity for comment, thus promulgating a rule in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A). *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (Table). However, the Corps continues to rely on this potential habitat theory in every legal jurisdiction except the Fourth Circuit. *See* Petitioners' Appendix at A-46 to A-49.

The Corps has further extended its territorial reach since 1986 without even a notification in the Federal Register prior to promulgation. In 1987, the Corps published a manual which technically described how to delineate or define both adjacent and isolated wetlands for purposes of regulation under Section 404. That is, the manual purported to distinguish between wetlands and nonwetlands. The fundamental requirement for finding a wetland was the concurrent presence of three conditions: saturation with water, hydric soil, *and* a prevalence of plants adapted to such wet areas. In 1989, a new manual[6] was adopted expanding further the geographic scope of Section 404; the new manual allows the Corps to assume that one or two of the prerequisite conditions exists due to the confirmed presence of others.[7] In this case, the Corps' jurisdiction goes beyond this tenuous definition of "wetlands" to cover temporary puddles. Now, a mere showing of some rainwater and the potential for bird bathing is sufficient to bring land within Corps power.

The Corps uses the potential habitat theory to assert regulatory power over all categories of "other waters"

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[6] Federal Interagency Committee for Wetland Delineation. 1989. *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. United States Army Corps of Engineers, United States Environmental Protection Agency, United States Fish and Wildlife Service, and United States Department of Agriculture Soil Conservation Service, Washington, D.C., Cooperative technical publication (January, 1989). This agreement was entered into without notice or opportunity for public comment. Pending litigation challenges the manual as a rule promulgated without proper procedures. *Mulberry Hills Development Corporation v. United States*, 32 E.R.C. 1195 (D. Md. 1989) (motion for reconsideration pending). For a critical view of agencies regulating by memorandum, *see* Tabler and Shere, *EPA's Practice of Regulation-by-Memo*, 5 Nat. Resources & Env't 3 (Fall 1990) (causes poor decisions and short-circuits the political process).

[7] *See* Want, *supra* note 2, at 2-11.

such as, isolated wetlands, vernal pools, and prairie potholes, which may be miles from open water. Isolated wetlands alone easily encompass millions of acres in the continental United States. *See* petition at 8 n.10. In Alaska, fully 74% of nonmountainous land or at least 170 million acres are estimated to be wetlands with a substantial percentage being isolated wetlands. *See* Resource Development Council, *Resource Review*, "Wetlands Policy Could Cripple Alaska's Economy" 5 (Oct. 1989). The decision below drastically expands the reach of the Corps beyond these millions of acres by including mere temporary rain puddles as another navigable water.

In a case before the United States Court of Appeals for the Sixth Circuit, the scope of this broad jurisdiction over isolated waters and wetlands was discussed:

> "[T]he Corps has now expanded the definition of 'navigable waters' to include any creek or stream or moist area. . . . A farmer's low lying farmland or a homeowner's low lying backyard —adjacent to a small stream or creek but many miles from any navigable waterway—has apparently been converted into government property no longer subject to control or improvement by the owner without government permission." *United States v. Larkins*, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merritt, C.J., concurring), *cert. denied*, 489 U.S. 1016 (1989).

And, the facts in this case go even further. Here, the moist area is not even adjacent to a stream or creek. Thus, the regulation reaches even more private property.

B. The Corps Has Illegally Transformed Its Section 404 Permit Program into a Scheme to Exact Open Space from Owners of Private Property

In *Riverside*, this Court assumed that overbroad regulations reaching insignificant "waters" could be remedied

through issuance of permits. 474 U.S. at 135 n.9 (referencing wetlands adjacent to navigable waters).[8] However, the Corps' permitting program may mean either no development or very expensive development due to oppressive mitigation conditions. Often, expensive mitigation measures are required even for projects in low quality isolated waters and wetlands which provide neither water quality benefits nor useful wildlife habitat. Thus, the permitting program is not a reasonable remedy for overbroad regulations, but an opportunity for the Corps to expand its habitat protection scheme by exacting valuable property rights.

Section 404(b)(1) of the Act mandates the preparation of guidelines for evaluating Section 404(a) permit applications. The guidelines create a presumption against discharges of fill into any "waters" of the United States. *See* 40 C.F.R. § 230.1(c) (1989); *see also* Want, *supra* note 2, at 6-8 n.32. The guidelines treat the filling of special aquatic sites, including isolated wetlands and mudflats, as "among the most severe environmental impacts covered" by the guidelines. 40 C.F.R. §§ 230.1(d) and 230.42. Accordingly, the guidelines flatly prohibit filling isolated wetlands and mudflats if practicable alternatives exist, even if the "water" is not useful for water quality or wildlife habitat. 40 C.F.R. § 230.10(a). Further, practicable alternatives are presumed to exist for all nonwater-dependent projects unless clearly demonstrated otherwise. 40 C.F.R. § 230.10(a)(3). These onerous regulations have stopped even small development projects on minuscule "waters," thus severely interfering with reasonable property use. *See Hough v. Marsh*, 557 F. Supp. 74, 83-84 (1982) (developer of two homes, requiring filling of

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[8] But, permits may not be available. For example, states may deny certification to federal permits, making the general or individual permits absolutely unavailable as remedies to private property owners. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); *see United States v. Marathon Development Corporation*, 867 F.2d 96 (1st Cir. 1989).

one-quarter acre wetland, failed to "clearly demonstrate" that no practicable alternative existed).

Once the Corps has the permit applicant over the proverbial barrel, the exactions begin through the use of mitigation conditions. Specifically, the Corps and the Environmental Protection Agency have entered into a Memorandum of Agreement demanding "no net loss of wetlands."[9] This agreement imposes absolute mitigation requirements on all individual permits even for filling low quality isolated wetlands, or where the public need for the project is great. For example, the Municipality of Anchorage, Alaska, needed a Corps permit to fill 14 acres for infrastructure expansion at its port, but the federal government demanded off-site mitigation costing up to $1 million. Resource Development Council, *Resource Review* "Wetlands" 5 (Nov. 1989). Anchorage Mayor, Tom Fink, called the mitigation conditions "extortion." *Id.*

This Court has recognized that private property ownership includes the right to build and the right to make productive use of property, "subject[ ] to *legitimate* permitting requirements." *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987) (emphasis added); *see also Riverside*, 474 U.S. at 127. In *Nollan*, this Court ruled that if a state agency has authority to deny the permit outright, the agency could instead grant the permit subject to conditions that ameliorate the harms that would have justified denial.

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[9] *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines* 2 (Feb. 7, 1990). This is another example of regulation by memorandum without notice and opportunity for public comment, *see supra* notes 4 and 7, being challenged in the courts as a rule promulgated without proper procedures. *Municipality of Anchorage v. United States*, 32 E.R.C. 1199 (D. Alaska 1990) (motion for reconsideration denied, notice of appeal due March 5, 1991).

483 U.S. at 835.[10] With isolated waters and wetlands, the Corps is without authority to deny these permits in the first place because the private property is beyond the territorial jurisdiction of the agency. Therefore, the Corps has no authority to impose permit conditions. The Corps forces permit applicants into mitigation concessions based on the illegitimate assumption that the permit could be denied outright.[11] These illegitimate permitting requirements interfere with the landowner's private property rights and constitute "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (citation omitted).

In sum, the Corps' regulatory program can be pictured as a creeping lava flow, threatening to consume vast amounts of private property in the country. "Navigable waters" are now defined to include temporary puddles. The goal of "water quality" is now a guise for acquiring open space and wildlife habitat. In short, the Clean Water Act permitting authority has been subverted into a tool for unrelated exactions. By administrative fiat, the executive agencies have radically expanded the Section 404 regulatory program beyond its legislative scope and intent, and all at the expense of private property.

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[10] This Court went on to hold that a regulatory taking occurred because the condition imposed failed to "substantially advance" a legitimate governmental interest. 483 U.S. at 834.

[11] Private property owners may be forced into the permit program during a project on a mere assertion of agency power, and may need to spend substantial sums on restoration before having their permit application heard, despite holding a good faith belief that the agency has no jurisdiction. *See* 33 C.F.R. § 326.3(e) (no action on after-the-fact permit application until restoration complete); *see also Hoffman Group, Inc. v. Environmental Protection Agency*, 902 F.2d 567 (7th Cir. 1990), *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990) (agency compliance orders per CWA § 309(a) not reviewable until civil action filed by agency or permit denied).

II

THE DECISION BELOW IS CONTRARY TO THIS COURT'S INTERPRETATION OF CLEAN WATER ACT § 404

The agencies and the court below have abandoned the express intent of Congress. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, this Court concluded that the Clean Water Act in general and Section 404(a) in particular were intended by Congress to combat the problem of water pollution.[12] In the decision below, the Ninth Circuit failed to consider this Court's interpretation of Clean Water Act § 404(a) as stated in *Riverside*. Instead, the court below decided that the "waters" at issue were subject to Section 404(a), not because of the potential to cause water pollution, but solely due to the possibility that migratory birds might use the property. Petitioners' Appendix at A-11 and A-12. Thus, the decision below conflicts with an applicable decision by this Court.

This departure from congressional intent stems from the Ninth Circuit's failure to apply this Court's two-step approach for analyzing agency interpretations of statutes as announced in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). First, a court must determine whether Congress spoke to the issue and, if not, whether the agency's interpretation is reasonable or permissible. *Id.* In *Riverside*, this Court applied this two part test to evaluate the Corps' regulatory power under Clean Water Act § 404(a). 474 U.S. at 131.

In the opinion below, the Ninth Circuit fails to analyze whether Congress spoke to the precise issue at bar; namely,

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[12] In *Riverside*, this Court said that any definition of "waters" subject to Section 404(a) must consider "the realities of the problem of water pollution that the Clean Water Act was intended to combat." *Riverside*, 474 U.S. at 132.

whether Congress intended the Clean Water Act to extend Corps regulatory power to a "water" based on migratory bird use, without any connection to water pollution. Instead, the court below states that Congress intended to extend Corps jurisdiction "to any aquatic features within the reach of the Commerce Clause power." Petitioners' Appendix at A-6. The court then cites for authority its own precedent supporting that proposition in dicta.[13] However, neither the decision below, nor any Circuit Court of Appeals decision, addresses the issue raised here; whether the Corps' regulatory power under the Clean Water Act extends to a marginal wetland area, tenuously classified as a "water," the filling of which has no effect on water pollution.

This Court specifically stated that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside*, 474 U.S. at 133. Thus, this Court found that Congress invoked *powers* under the Commerce Clause, but this Court did *not* rule that Congress invoked *all* its power under the Commerce Clause, as the Ninth Circuit held. A comprehensive reading of the legislative history indicates that Congress intended to regulate only water connected with *waterborne* commerce.[14]

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[13] The court cites *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755-56 (9th Cir. 1978) (holding that Corps jurisdiction extends to periodically inundated diked lands which formerly were marshlands subject to the ebb and flow of tide: "We express no opinion on the outer limits to which the Corps's [*sic*] jurisdiction under the FWPCA might extend") and *California v. Environmental Protection Agency*, 511 F.2d 963, 964 n.1 (9th Cir. 1975) (holding that federal agencies are required to comply with state water pollution permit programs), *rev'd*, 426 U.S. 200 (1976).

[14] *See* Jackson and Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future*,

(Continued on following page)

In *Riverside*, this Court found that extending Corps jurisdiction beyond open water to adjacent wetlands was reasonable due to the "evident breadth of congressional concern for protection of water quality," and the interrelated nature of navigable waters and adjacent wetlands. 474 U.S. at 133. Contrarily, the Corps has never shown that putting clean fill dirt[15] on this category of "other waters," namely isolated crystallizers and calcium chloride pits containing rainwater, impacts water pollution in any manner. This is clearly because these waters do not connect hydrologically to any other water body. Petitioners' Appendix at A-13. Rather, the Corps asserts that these isolated "waters," which remain dry land most of the year, and other isolated wetlands must be protected as potential habitat or open space for wildlife pursuant to the Clean Water Act.[16]

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7 Pub. Land L. Rev. 21, 33 (1986). (Congress intended to limit Corps jurisdiction to "all waters covered by the expanded judicial interpretations of [navigable waters], but no others.")

[15] Although not raised by petitioners, there is some question whether Congress intended to regulate the discharge of clean fill dirt as a pollutant. The definition of pollutant includes dredged spoil, but not fill or dirt. CWA § 502(6), 33 U.S.C. § 1362(6). According to Senator Muskie, the word fill was added to Section 404 to make clear that Congress intended to regulate the discharge of dredge spoil on land which is then called fill. *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 62 (1976).

[16] The Corps asserts this despite the fact that as recently as 1985, the Corps' civilian supervisor told Congress: "One significant point to recall is that the Congress did not design Section 404 to be a wetland protection mechanism and it does not function well in that capacity." Testimony of Robert K. Dawson, Acting Assistant Secretary of the Army for Civil Works, *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 61 (1985).

The decision below holds that Corps jurisdiction over an isolated "water" is reasonable due solely to migratory bird use—without any effect on water quality. Congress' clear intent was to grant the Corps authority to combat water pollution; Congress never intended that mere use by migratory birds act as the surrogate to extend Corps regulatory power to any wet area. Thus, the decision below violates this Court's admonition that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

III

REGULATION OF ISOLATED WATERS AND WETLANDS CANNOT BE JUSTIFIED UNDER THE COMMERCE CLAUSE

This Court need not go beyond petitioners' argument that Congress did not intend to regulate the isolated waters at issue in this case in order to conclude that this case warrants review. However, in the event that this Court were to conclude that Congress *did* intend to regulate these isolated waters, certiorari must still be granted because by attempting to regulate isolated waters and wetlands Congress is exceeding the scope of its constitutional authority.

Petitioners' statement that "Congress was aware that, constitutionally, it could reach further," petition at 14, is too generous. Similarly, the opinion below is inaccurate when it states that "[t]he Commerce Clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which *may* provide habitat to migratory birds or endangered species." Petitioners' Appendix at A-12 (emphasis added). Amici urge that there is an independent ground for granting certiorari in this case—the ground that Congress lacks altogether the authority under the Commerce Clause to regulate

isolated waters and wetlands that do not significantly affect interstate commerce.

In essence, by attempting to regulate Leslie Salt's property, the Corps of Engineers has adopted the "glancing duck" theory of jurisdiction[17]—if a flying duck were to look down and see standing water, then the duck might consider landing on the water, and the duck's glance would be an effect on interstate commerce. But as this Court has stated, the Commerce Clause does not justify congressional use of a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968). *See also* Tribe, *American Constitutional Law*, § 5-7 at 313-14 n.2 (2d ed. 1988).

The Commerce Clause provides Congress substantial authority to regulate activities that directly or indirectly affect commerce, not the enumerated power to regulate potential duck landing zones.[18]

The court below relies upon *Hughes v. Oklahoma*, 441 U.S. 322, 329-36 (1979), a case dealing with the interstate transportation of minnows, for the proposition that Commerce Clause power extends to the regulation of *potential* habitat of migratory bird or endangered species because Congress has Commerce Clause power over wildlife. *See* Petitioners' Appendix at A-12. This is a seriously distorted gloss on *Hughes* that fails to put that case in its proper

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[17] The glancing duck theory is a graphic description of the potential habitat theory of jurisdiction extensively discussed, *supra*.

[18] Indeed, if the federal government's Commerce Clause power reaches to all lands that collect rainfall because wildfowl and endangered species might use that land, why not all fields of grain that might attract migratory birds? Why not all uplands where a migratory bird might nest? Indeed, under the Ninth Circuit's rubric, the only land that could *not* be regulated by the federal government under the Commerce Clause would be fresh lava beds and glaciers.

context—which was the ability of a state to impede interstate commerce in animals. *Hughes* has nothing to do with the question of whether or not all potential *habitat* for wildlife falls under federal Commerce Clause jurisdiction. *Hughes* merely found that once wildlife enters the stream of commerce (which usually occurs after killing or capture) a state cannot place burdens upon interstate commerce unless the traditional Commerce Clause burden tests are met. *Hughes*, 441 U.S. at 336.[19]

The proper test for determining whether a statute fits under the auspices of the Commerce Clause was outlined in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

> "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[20]

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[19] For a time there existed the belief fostered in the 19th century that once wild animals were reduced to possession, states retained some sort of title in those animals and could prevent their introduction into interstate commerce. *See Geer v. Connecticut*, 161 U.S. 519, 530 (1896). As discussed in *Hughes*, this principle was eroded over time. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977), it was noted that a state's "title" over game animals was an anachronistic concept and could not be used by a state to discriminate against out-of-state fishermen. *See Hughes*, 441 U.S. at 334-35. Finally, in *Hughes* the controversy was put to rest: A state's interest in its wildlife and natural resources was not sufficient justification, *a fortiori*, for placing a burden upon interstate commerce. *Hughes*, 441 U.S. at 336. *But see* dissenting opinion of Chief Justice Burger and Justice Rehnquist in *Hughes*, 411 U.S. at 339-46 (*Geer* remains good law because the "ownership" theory is shorthand for a state's strong interest in conserving its resources).

[20] The impact on commerce must be "substantial." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24, 26 (1937).

There is no showing whatsoever in the legislative history of the Clean Water Act that land use activities on isolated waters and wetlands affect interstate commerce. Congress nowhere found that the viability of migratory waterfowl or endangered species populations is dependent upon the preservation of such isolated wetlands. There is, therefore, no congressional finding on which to examine the rational basis test. The first prong of the *Hodel* test fails. The second prong is likewise suspect because the nexus between interstate commerce in migratory birds and wildlife has not been shown to be connected, reasonably or otherwise, to a permitting program on isolated waters and wetlands. These isolated waters and wetlands have not been shown to contain significant reservoirs of animal habitat—and certainly have not been shown to be more habitable than any other area of thoroughly dry land. Thus, even if Congress had intended to extend the reach of its jurisdiction to isolated waters and wetlands, that reach would violate the limits of the Commerce Clause.[21]

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[21] This Court, of course, must be cautious before extending the already stretched Commerce Clause beyond the breaking point. The Commerce Clause has already been generously interpreted. *See Wickard v. Filburn*, 317 U.S. 111 (1942), a case described by Justice Douglas as having reached the "outward limits" of that clause. William O. Douglas, *The Court Years, 1939-1975*, at 50 (1980). Already, cogent arguments have been made that the New Deal extensions of the Commerce Clause are doctrinally insupportable. *See* Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1449-554 (1987). Even if it were accepted that the Court's interpretation of the Constitution must conform to modern perceptions of public policy, it is asserted that the New Deal policy reasons in favor of increased federal intervention in commerce are the result of flawed economic theory. *Id.* at 1453.

CONCLUSION

Whether the Clean Water Act authorizes regulation of private property on the sole basis of protecting open space for wildlife habitat is an issue needing definitive resolution by this Court. The present case should now be reviewed, not only to resolve this issue and prevent the injustices that would otherwise result, but also to remove the expansive Commerce Clause reasoning in the opinion below.

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